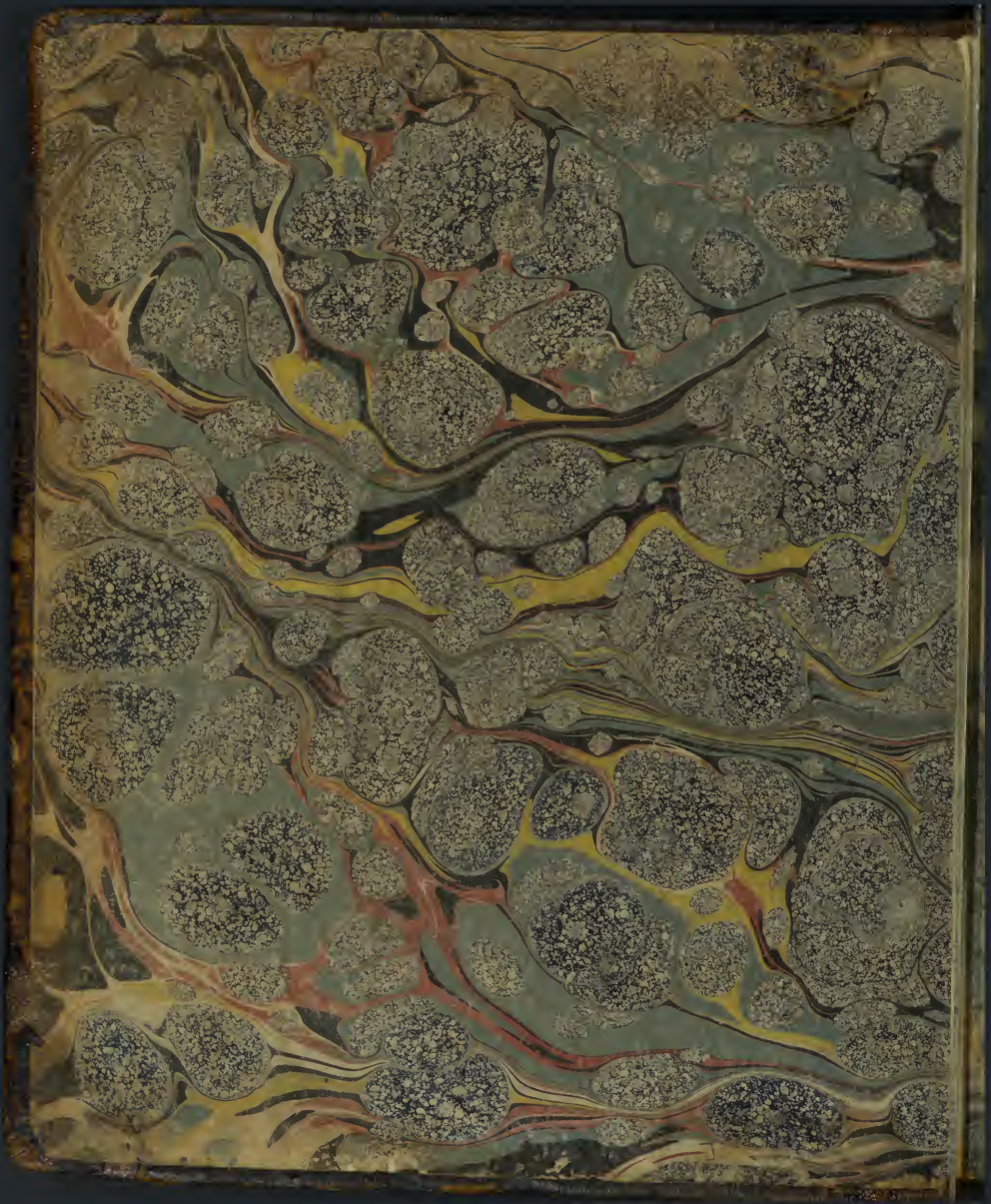

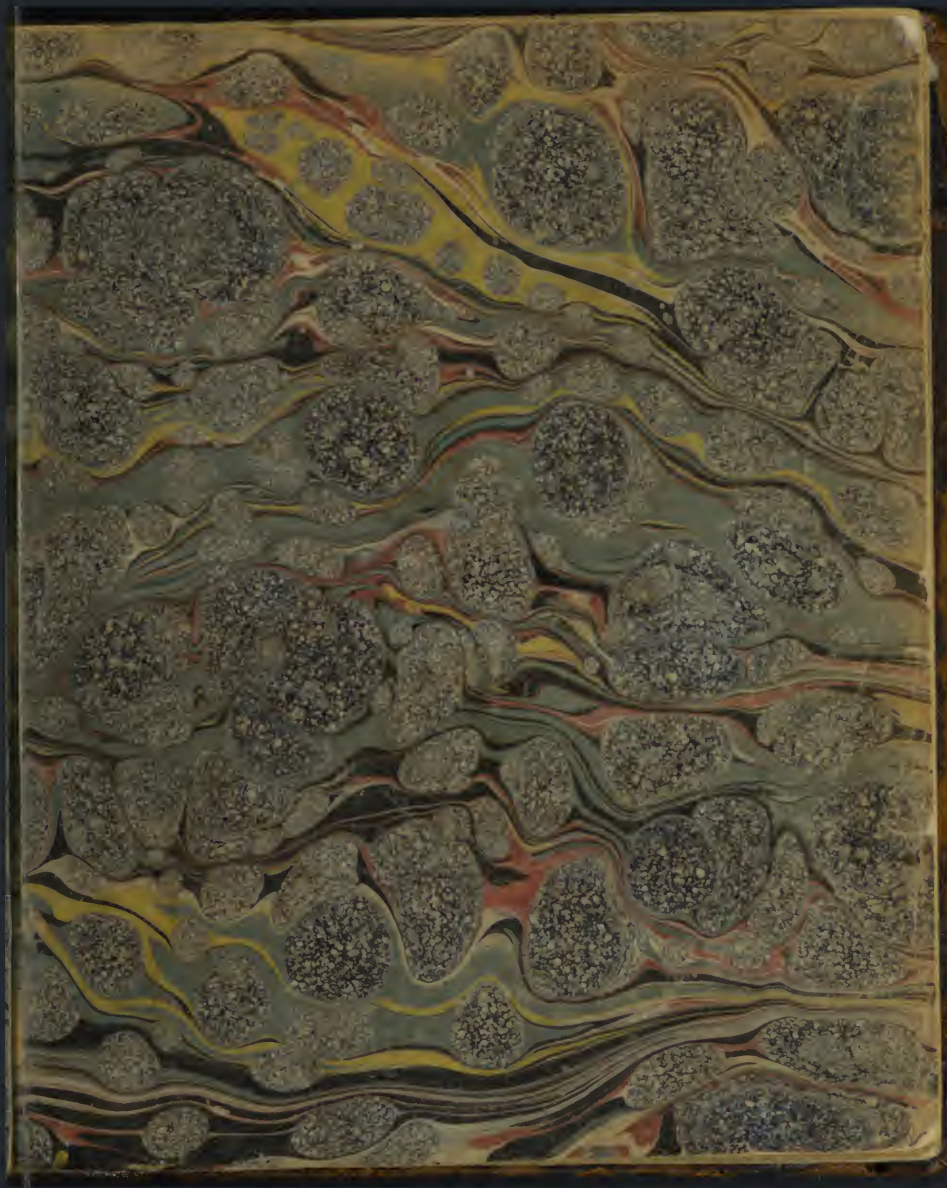

Wheeler

Remark's

1 Bl. 43. 3 line
of 2 Paragraph is
there that revealed
Law & law of nature
are distinct

Preface to
Vattel. 1. b. 8.

3 Bla. 43.

Of Law.

Law in its most significant and extensive meaning is strictly a rule of action, and when thus defined applies to every species of conduct. of Law however thus understood there are several kinds . . . . . .

1st. The law of Nature; which is the unrevealed law of God and obligatory upon all men. . . . . .

2d. The law of Nations; which is merely the law of Nature applied to nations.

3rd. Municipal Law; which is a rule of civil conduct prescribed by the supreme power in a State commanding what is right and prohibiting what is wrong. . . . . .

In one word. Municipal Law is a rule of civil conduct, Natural Law of moral conduct, and Revealed Law both of moral conduct and faith.

The particular subject of the ensuing Lectures is the consideration of that branch which regulates civil conduct — and first therefore

Of Municipal Law.

1st. To be obligatory according to the definition it must be "a rule" and is therefore said to be permanent, uniform and universal. It is however never more universal than its peculiar extent necessarily requires, and it is always general and not personal within its particular local limits. This differs from a compact as it is a compulsory command issued to the person obliged to perform it, whereas a compact will be

Remarks.

x laws which are retroactive are plainly allowed by the Constitution of U.S. for a prohibit making ex post facto law & also allow of laws to be made which impair the obligation of contracts — 1 Bl. 45.

a retroactive law does not conform to the definition of a law which is that law is a rule prescribed

Bullv Calder

1 Bl. 4.5.6.90

Of Municipal Law.

necessarily void unless it proceeds voluntarily from the person bound by it.
2d. It must be prescribed. A Retroactive Law therefore in its essential nature must necessarily be void because the definition requires such a publication of the Law that no person shall be liable to its restrictions unless furnished with a knowledge of it. There is however a material difference between a Retroactive and an Ex post facto Law. The first constitutes a Genus whereof the last is a species. A Retroactive Law is one which has a retrospective view, and it is entirely immaterial whether the operation of it is penal or remedial. The Supreme Court of the U.S. decided in the case of Bull vs Calder that a retroactive remedial Law can never constitute an ex post facto Law as ~~the last is contemplated~~ ex post facto laws are prohibited by the mode by the Constitution of the U.S. In Connecticut after a Statute of limitations had run on an Intestate Estate, the Legislature passed an act revising the particular claims of the Creditors to the estate, and enabling them to collect their respective debts. On a writ of Error taken to the Supreme Court of the United States it was determined that that the Legislature had this right and that this was not ex post facto.
3d. The rule must be prescribed by the Supreme power in a State. This always means the Legislative power, as in politics these are convertable terms —— Thus far as to the description of the Municipal Law. - - - - - - - - - - - - - - - - - -

Remarks.

(a) The preamble is no part of the law but generally sets out the reasons for making it —

6 Mod. 143.
19. Vin. 513.
4 Bac. 647.

Plowd 206.
4 Bac. 645.
1 Bla. 60.

* ? Vizey 365
3 P. Wms 885
or 1855.
Palmer 485.

1 Bla. 60.61

Rules of Interpritation of Laws.

1st. The words of a Law must be generally understood according to the known usual and popular signification of them. This rule is not however universal, since terms of art are to be understood according to their acceptation among the learned in that art. Thus, when a technical term of the Common Law has acquired a fixed signification and when used in a Statute, the Statute is to be construed according to the Common Law construction. So for instance the word "credible" as applied to witnesses in the Statute of Wills is construed as tho it had been compelled.

2nd. If words are dubious we may ascertain their meaning from the context, with which it may be useful to compare a word or a sentence, whenever they are ambiguous, equivocal or intricate. For this purpose the preamble is often resorted to, for assistance in the construction of the Statute. * On this principle also, other laws made by the same legislator, respecting the same subject may be compared with the dubious one to obtain a just and proper construction. . . . . .

3rd. The words in which a rule is couched are always to be understood as having reference to the subject matter of the law. As where the English Statute of Edw. 3 forbids ecclesiastics purchasing provisions at Rome, it would seem according to the common understanding of the word "provisions" that it prohibitted purchasing grain and other victuals; but when we consider the object of the Statute viz to repress the usurpations of the Papal see, and when we learn that nominations to

Remarks

The word "generality" in the paper wou and then the definition will be complete —

1 Mod. 344.
4 Bac. 652.

3 Bla. 431.
Bac. 62. 61
Co. Lit. 24.6
19 Vin. 514.
526.
Plowd. 292 —

1 Bla. 64. 63
67

Rules of Interpretation for Law. . . .

benefices by the Pope were called "provisions" we shall at once discover that the Statute intended to prohibit the purchase of such provisions only. . .
4th. The effects and consequences of different constructions are to be regarded in order to select that which is best. The rule is, that when words bear either none, or a very absurd signification if literally understood we must a little deviate from the varied sense of them; But where the meaning is plain no consequences are to be regarded for this would be assuming a legislative authority. . . . . .
5th. The spirit and reason of the Law must be consulted when the words are dubious, rather than the letter of it. The object of construing Laws is to discover the intention of the legislature, and from this object arises the Equity of Law, which means nothing more than the Equitable construction. The Equity of the law is defined by Grotius to be "the correction of that wherein the law by reason of its universality is deficient. This definition Mr. G. considers correct as far as it goes, tho' it is not sufficiently extensive to include the spirit of the subject. . . . .

Municipal Law is of two kinds 1st. Lex Scripta. 2d. Lex non Scripta.

I Of the law non scripta or unwritten Law. This is called the unwritten law because its original institution is not set down in writing It derives all its authority from general immemorial usage, which implies general acquiescence of the people and Legislature in the adoption. It consists of three kinds, 1 Common Law properly so called.

Remarks —

~~(a) which was in the latter part of the eleventh century~~ 1 Bla. 63.7.
(a) in the same manner as a roll of Parliament &c —
(b) Records of Courts can never be contradicted but decisions of Courts may be as they are liable to mistakes &c —

2 Inst. 238.239.
2 Rol. 269.
1 Bla. 63,4.

1 Bla. 64.

1 Bla. 69.70.

Rules of Interpretation for Law. - -

2nd. Particular Customs authorized by local usage. 3rd. Particular Laws, by custom observed only in certain Courts & Jurisdictions. - - - -

II. Of the Common Law. This is merely a general custom extending throughout a State, It may therefore be termed customary law, it is founded on immemorial usage, and is called Common Law, to distinguish it from particular and local customs. A Custom to be immemorial must extend back to the time of legal memory at the Accession of Richard I. (AD 1189) to the throne of England. This rule however was not established till about 60. years after this accession, So that what at first required only 60. years to transcend the bounds of memory, now requires Centuries; It is built on the decisions of Courts of Justice, & may be found in their Records, Reports, and in treatises of learned sages of the profession, preserved & handed down from the time of highest antiquity. - - - - - -

Question of fact are decided by the Jury Questions of Law by the Judges, and Courts of Justice. (d) Records and the decisions of Courts are not the common law (e) itself, but merely evidence of the common Law, This evidence is merely prima facie evidence and may be rebutted by the testimony and circumstances; And all these decisions may be overruled by every succeeding Court & Judge - But if these decisions were conclusive evidence or constitute the common Law itself they could never be overruled. A Precedent is a former judicial decision on the point in question & therefore affords evidence of the law also. A Precedent should always

Remarks.

(c) A precedent is not to be overruled merely because the reason of it is not discovered — Precedents are law makers of the law — if it is necessary that they should be done away let it be done by the legislature for statutes have not a retroactive operation but decisions have —

2 Bla. 263.
1 do. 74.

Rules for Interpretation of Law. . . . .

be followed, unless totally absurd and unjust. And as it is prima facie evidence, the "onus probandi" lies on him who objects to its being law, if he intends to rebut it by other circumstances.[e] . . . . . .

But a question arises how did the Common Law originate? There clearly must have been a time when it did not exist in fact, altho in a legal sense there never was. and the system in truth was created by Courts of Justice, however legal precision may reject by Courts the Idea. Society cannot exist a moment without either customary or positive laws, and untill any custom of this nature is prohibited by the Legislature, every customary Law established by Courts of Justice is sanctioned by the tacit assent of the Legislature, and therefore obligatory in every view. . . . .

Every new decision is not new law. But it is said to be merely a new exposition of the old Common Law which has always existed but never before promulged. — Thus Lord Mansfield is said by Justice Buller to have erected the whole system of the Law Merchant himself: Yet he pretends to no new branch of the Common law, but merely an elegant exposition of a Column which has long beautified the fabrick, but has for centuries been screened by the mass which originated from negligence and weakness. . . . . .

II. Of particular Customs. These are nothing more than local usages & thus differ from a prescription, which is merely a personal usage. Particular Customs derive their authority from the same source, and rest in the same

Remarks

Litt S. 265.
Co Lit. 175.
1 Bla. 76.

1 Bla. 76.

1 Bla. 75.
2 do 459.
L. Ray 175.
2 Bla. 461.
467.
Chitty on Bee
13.
3 Bla. 236.
Salk. 125

Rules of Interpretation of Law.

foundation as the Common Law. They are laws to all intents and purposes throughout the limits to which they extend. — Thus the custom of Gavelkind is an absolute law throughout the County of Kent. . . . . .

Tis a general rule that he who would avail himself of a particular custom, must plead it specially — For altho it is the duty of Judges to notice a general custom, ex officio, yet they cannot regard these, untill pleaded, more than a bond or any other private security. . . . . .

In pleading a particular Custom, two things are to be regarded, 1st The existence of such a Custom and 2 That the claim arising from it is within its purview and operation. . . . . .

Again as the Defendant may regularly deny any plea of such a Custom, if it is pleaded, as existing, the Defendant may dispute the fact and the issue will be tried by the Jury and not the Court, thus differing from the trial of Common Law principles. But if the same particular Custom has been previously determined and recorded in the same Court, the Jury cannot try the issue. . . . . .

There is a certain system of unwritten principles which is classed with those termed "Customs" denominated Law Merchant, This Judge Blackstone denominates a particular Custom. But there are three substantial reasons which militate against this idea of the learned Judge.

1st. It is not a local custom nor confined within certain limits, but is restricted only to certain transactions, called Mercantile.

Remarks

1 Al. R. 295.
Chitty 199
Dougl. 653.
Chitty, 28. 139.
4 Term. 258.
1 W Bl 1298.
2 Burr. 1218.
1222.
1216

Co Lit. 113.
1 Bla. 76.

Co Lit. 114.
1 Bla. 76

Co Lit 114.
1 Bla. 77.

Litt § 212.
1 Bla. 77.

Rules of Interpretation of Law. . . .

Neither is it a particular custom as it is not a local usage. 2 This is never required to be specially pleaded as a particular custom is. 3. This is never tried by the Jury nor supported by Witnesses, but decided by the judges as the Common Law. But if a new case arises the judges sometimes examine witnesses from a disposition to inform themselves, and conform to the practice of the Merchants. But even in this case, after Lord Mansfield had consulted Mercantile Witnesses he condemned the practice and overruled their testimony — From these circumstances it must be inferred that the Lex Mercatoria ought not to be stilled a Local usage. . . . . .

Construction of Customs

Of the Validity of Customs

Customs to be valid must be accompanied with several circumstances.

1st. They must have been immemorial, or they must have been used so long "that the memory of man runeth not to the contrary". . . . .

2d. It must have been continued & uninterrupted. But this interruption must be of the right itself to destroy the custom, as no forbearance of exercise will destroy this right. But if the commencement of this right can be shewn the right itself will be destroyed. . . . . .

3d. It must have been peaceable & acquiesced in, or that common consent which originated the immemorial usage will be wanting to support the custom.

4th. It must be reasonable or rather taken negatively, they must not be unreasonable. Unreasonable I say, because it is not incumbant on the

Remarks

1 Vol. ab. 565.
1 Bla. 77.

9. Co. 58.
1 Bla. 77.

1 Bla. 78, 9.
Co. Lit. 15.

Of the Validity of Customs

party pleading it to shew the custom is to be reasonable, On the contrary the party disputing it must shew its unreasonablenes to overthrough it and distroy its efficacy . . . . . .

5th. It must be certain. Certainty is equally requisit to the support of General as to particular customs and to both as to Statutes or Contracts. . . . . .

6th. Customs tho established by convent must be (when established) compulsory And so must General customs in order to be binding . . . . . .

7th. Customs must be consistent with each other and hence two contradictory customs will distroy each other . . . . . .

If a party intends to reject any custom pleaded by the other he ought to deny its existance. For if he admits its existance, & then relies upon another inconsistant with it, this rule abrogates both, and it would be attended with a manifest absurdity . . . . . .

Construction of Customs

Those Customs which are in derogation of the Common law are to be construed strictly and never extended to other cases of a similar nature Thus by the Custom of Gavelkind in Kent, an Infant may convey all his Estate in fee simple, by deed of Feoffment, yet he cannot convey a life Estate, neither an Estate for Life or years, because it is in derogation of the Common Law. . . . . .

In England, it is a general rule that Customs submit to the Kings prerogative, Thus if he buys land in Kent it descends, according to the

Remarks.

1/3/a. 67.
77. 80, 2.

1/3/a. 79. 80.

Construction of Customs. . . .

Common Law of the realm & not according to the particular customs of Kent.

III. *Of Particular Laws* which are generally observed only in certain Courts, and Jurisdictions. These are generally in Great Britain the Civil and Cannon Laws of Rome. They differ from particular customs which have local usages, as those have merely a local jurisdiction. These derive all their force in Great Britain from their adoption and not from any intrinsic efficacy in their nature. This adoption may have been by immemorial usage, or by act of Parliment, In the last case they cease to be unwritten Laws and are equally binding with any Statute, But as we are considering unwritten law at present, the first peculiarly demands our present attention. . . . . .

These particular unwritten Laws are binding in England because they have been adopted and acted upon in their Courts of Justice. . .

For the same reason in these United States the Common Law of Great Britain as far as it has been adopted derives its force altogether from a similar sanction. Under these circumstances therefore the Common Law of England ought not at the present time to be rejected in any part of this Country, unless it can be proved to be absurd unjust or inapplicable to our particular circumstances; It has been generally adopted and has acquired general assent as the rule of our civil conduct. The true rule seems to be this, the common Law of England is *prima facie* binding here, and those cases in

Remarks.

Fredericksburg Va.
4. 4. 62.

Construction of Customs.

which it is not binding are exceptions to the rule. The exceptions are where the principles are wholly inconsistant with our form of Government, but these only serve to strengthen and confirm it . . . . . .

A Question has long been agitated how far the English Statute Law is binding, independant of its special adoption? To decide this it will be difficult; In the State of New York they have been adopted "in mass" and in many other States several of them have imperceptably gained ground and respect. Thus the Statute "de donis" is considered obligatory in ~~every~~ State without the sanction of Legislative interference, and so is the Statute of Gloucester taxing ~~costs~~ costs. likewise the Statute of Westminster 2d. on which is founded the action on the Case . . . . . .

The present rule of adopting English Statutes appears to be arbitrary, since without any ostensible reason we have considered all the English Statutes enacted prior to the middle of the reigns of Hen. 8th. as obligatory and conclusive upon us, The proper aera for a distinction was that of the Colonization of America, and no other can be admitted with reason. - - - - - - - - -

Can a Common Law distinct from the Common Law of Great Britain exist in ~~Great Britain~~ Connecticut?

This question has excited much warmth and solicitude among the Jurists of our State particularly on the first establishment of

Remarks.

Construction of Customs. . . . .

the Federal Government before the Circuit Court of the United States while Judge Wilson presided. . . . . .

Mr. Gould is convinced of the necessity and consequent propriety of such a system: for where their Common Law is inapplicable to our State, we must have another variant from theirs, or a failure of Justice will inevitably follow. . . . . .

So likewise when an adherance to theirs is attended with absurdity or injustice we must unavoidably have one of our own to regulate our Courts. . . . . .

The Common Law is a System of Ethics (as applied to all our concerns) of perfect obligation. It is a perfect system of principles which in its various ramifications is exactly commensurate with the wants and necessities of Mankind: But the Statute Law can never answer this purpose. It is impossible that the legislature should make positive Laws for every transaction. Civil Society can never exist without a customary Law. The English Customary Law in certain respects we never can have; necessity therefore requires that we should have a Common Law distinct from theirs — But the advocates for the opposite opinion contend that we can never have a Common Law, because this Country was not settled in the time of Richard 1st. and therefore we can have no immemorial usage: I answer that 60 years was sufficient to establish theirs originally, & surely the same time should be adequate to our object: And that the very objection

Remarks

8 Co. 20.
1 Bla. 88.

2 Ld Ray. 75.
1 Bla. 108.
Salk 441.
666.
Ros. Dev. 62.
Kirby. 269.

1 Bla. 33. 6.

Construction of Customs.

comprizes an absurdity in terms. For to say we must have immemorial usage to have a Common Law distinct from the English, is to say that we must have their Common Law rules if we have a distinct Common Law. So that we can have no distinct and independant Common Law, because it will be distinct and independant from the English System. How propositions & absurd!

II. Of the Lex Scripta or Statute Law.

This general division of Municipal Law is said to be written because its original institution is committed to writing, and the Roll or original Record is the Law itself. It is supposed that many parts of the Common Law are derived from ancient Statutes which are not now extant. How many rules are thus derived it is difficult to determine and quite unimportant. The most ancient Statute now extant is the Magna Carta of King John as affirmed by the Statute 9 Hen. 3d. — These ancient Statutes which were enacted prior to the Colonization of Connecticut are here equally binding with the Common Law. . . . . .

I. Statutes are either Public or Private.

Public Statutes respect the whole community. . . .

Private Statutes only regard particular persons and private concerns, and whose rules do not extend to any other persons or concerns and therefore ~~and~~ are not referring to the civil conduct of the community at large. Altho the distinction between them is

Remarks.

(b) a stat. respecting money being paid into a town treasury in private —

4 Co. 76. a. b.
Vin. 496.
Ld R. 120.
321.
4 Bac. 639.

1 Bla. 86

4 Co. 77.

8 Co. 22. 138.
Hob. 227.
4 Bac. 640.
Skinn. 429.

10 Co 47.
4 Bac. 640.
12 Mod. 249.

Of the Lex Scripta or Statute Law.

perfectly apparent, yet the application of this distinction in practice is not so obvious as to require no elucidation. The bulk of Statutes relates to Public and General conduct. And there are particular cases where Statutes that relate immediately and in terms to particular classes of men only, are notwithstanding considered as public Acts and regarding the whole community. As for example, a Statute respecting "Mechanics" This would be denominated a public Statute, but if it regarded Shoe-Makers or Taylors only, it would be private. The distinction is very nice and the true rule for ascertaining it appears to be this, "If the class of persons to whom the Statute relates be a Genus, it is a public Act. But if the Statute contemplates what is denominated a species it is private". Now as species is a relative term the difficulty which arises naturally requires a succeding rule, which is this. "If the highest division of the class contemplated, is capable of a subdivision into classes it is a public Act, but if it only admits of a subdivision into Individuals it is then a private Statute". . . . . .

In England, however, every Statute relating to the king is a public one, for he is always regarded a Parens Patriæ the head of the Body politic a known and independent branch of the constitution. For this reason, a Statute inflicting a penalty or requiring a forfeiture for the King, (as in this County for the State) altho its operation may be confined to certain individuals: yet is considered a public act. So likewise any Law which immediately relates to the public revenue, is public (t); altho it affects only a species of men.

Remarks

12. Nov. 613.

Stat. Con. 253.

Of the Lex Scripta or Statute Law. . . .

Thus a law imposing a Tax on every Garment that is made by a Taylor is a public law, since the public weal is benefitted by it. — For example the Statute of Frauds and Perjuries is a public Act. Likewise a Statute extending to all "Mechanics." — But a law respecting Blacksmiths or Taylors is merely a private Statute, since the highest class of Taylors is capable of no division above Individuals. . . . . .

II. Statutes are either declaratory of the Common Law or remedial of some defects in it. . . . . .

1 Declaratory Statutes merely declare what the Common Law is or has been; they make no new Law, but merely expound the old one and the Legislature in these Statutes virtually acts in a judicial capacity which appears improper, as it is the province of the Legislature rather to make Laws than to declare it. The Statute of Connecticut which defines the tenure of Lands holden in fee simple is merely declaratory; it was enacted merely to settle a disputed point, & declare that the people of this State had an allodial property in their Lands. An absurdity in terms! since fee simple, and allodial property are entirely independent, the first expressing a title gained from a Superior, while the last implies an independent title. But since their intention is understood it is immaterial.

2 — Remedial Statutes introduce new Laws, either by supplying the deficiences, or abridging the superfluities of the old. — All Statutes which do not declare the old Law, but create new Law, are Remedial, As for in-

Remarks.

4 Bac. 450.
Cro J. 414.
415.

Salk. 212.
1 Wils. 125.

1 Wils. 126.
4 Bac. 650.
3 Co. 76.
7 Term. 189.

Salk. 205.
Carth. 119.
4 Mod. 7.
Comb. 100.
Carth. 466.

Comp. 382.
1 Wills. 125.
4 Term. 753.
7 Do. 257.

Of the Lex Scripta or Statute Law....

stance, our Statute of Book Debt.... The great body of all Statutes is composed of Remedial Laws. Again – Those Statutes which inflict a penalty or punishment of any kind are denominated Penal Statutes. The word penalty in its most extensive acceptation, is synonymous with punishment; but commonly used to denote a pecuniary amercement. And in this sense, all Statutes giving higher remedies than the rules of natural justice require, altho not so considered in the books: Thus a Statute giving triple damages ~~are~~ know then sufficient to satisfy the requisition of natural justice.....

A Statute not inflicting a penalty of any kind is denominated Beneficial or sometimes Remedial, altho in the last case not as contradistinguished from Declaratory, but penal.....

The Statute giving Costs to a successful party in a suit is penal & always so considered as Costs were never known at Common Law, & regarded their first introduction as a species of penalty inflicted for a failure in justice. This species of penalty was substituted for the ancient amercement pro falso clamore by the Statute of Gloucester 6 Ed. 1st.....

Altho a Statute inflicting a penalty is called a penal Statute, yet as many Statutes give the whole or a part of the penalty to him who sues for it an action brought by an individual in his own right, to recover it is termed a civil action; and the declaration is amendable by the Statute of but a penal action is not. This distinction is very material as many rules apply to penal which do not to civil causes. So if the action is to recover part for

Remarks.

2 Inst. 200.
1 Bla. 89.

Hob. 111.
Hob. 222.
2 P. R. 371.
1 Ro. 910.
Hob. 14. 309.

1 Jones 92.
4 Bac. 636.
19 Ves. 520.
6 Mod. 287.
4 Bac. 638

Of the Lex Scripta or Statute Law. . . . . .

the individual & the residue for the State, it is a civil, not a penal action. The common action on such Statutes is the action of Debt, but in Connecticut the action of Indeb. Assumpt. has been adjudged appropriate. . .

Lastly all Statutes are called either Affirmative or Negative: but the distinction consists in the phraseology, tho' some times different constructions to them are given in the Books. . . . . .

In England, every Statute commences its operation from the first day of the session of Parliament in which it is enacted unless some other time is limited for its begining in the act itself as is most frequently the case — The reason of it is probably this. The whole session is considered as one day — as the session of any Court in a day is esteemed the same, and no fractions of a day are allowed. . . . . .

Thus like all retroactive laws which have a retrospective operation it may be oppressive, since on the last day of any session, a new felony may be created & one who has accomplished an innocent act during the session may be liable to punishment. . . . . .

It follows from this, that if two acts are passed the same session on the same subject the one repeals the other, as there is no priority, if they are inconsistant, both must be abrogated. But since there is a rule that if two Statutes are repugnant the last repeals the first, there is one authority which goes to the ~~destruction~~ distinction of this legal fiction and establishes the law enacted last in fact . . . . . .

Remarks...

3 Co. 76.
1 Bla. 87.

Of the Lex Scripta or Statute Law. - - - -

In Connecticut, there is no definite rule respecting this subject, but it is universally agreed, that no person is bound by a Law untill all persons have enjoyed the means of Obtaining its knowledge. - - - - - - -

Of the construction of Statutes

I have before observed that by construction, is ment the discovery of the intention of the Legislature and to construe a Statute Equitably is to ascribe to it the intention of the makers of the Law - As this is the discovery of the intention of the Legislature the following rules of construction are intended to aid the mind in making that discovery. Very frequently the construction will turn upon the nicest rules of grammar and on very subtle and artificial distinctions. - - - - - - - - -

I. In the construction of Statutes and espetially those which are remedial, three points are to be considered. 1 The old Law 2. The Mischief & 3. The Remedy, that is.

1 What was the Common Law when the Statute was made;

2 What was the Mischief for what the common did not provide

3 What remedy the Legislature has provided to cure this mischief.

The two first, are those which are principally to be regarded in constructions — these will shew what remedy was intended to be provided. - - -

II. Penal Statutes according to the general rule, must be construed strictly i.e. according to the letter of the Statute, and not according to the spirit of it. Ex. gr. The Statute of Edw. 6th. enacted that those who were convicted of stealing horses should not have the benefit of Clergy the

Remarks. --

(9)

Modern decisions have heard upon this rule and Ld. Kenyon says that the intention of the legisla=
=ture if plainly expressed is to be followed in all cases — 4 T. R. 3. —

4 Bar. 651.
Plowd. 17.
3 Co. 7. 8.
8 Mod. 65.

It is a general rule that if the repetition of an of=
=fence incurs an increased penalty, the offender is not subject to the increased penalty unless judgement has been given against him for the former offence and unless this was done before the second offence was committed —

Plowd. 465.

1 Hawk. 147.
283.
19 Vin. 501.
4 Term. 3.
10 Ma. & S. 3 & 4
7 B. Plow. 7.
5 Mod. 54.
Leach 600.
10 Ed. 50. 387.
2 Ld. 3 & 293

Plowd. 86.
Cro. C. 71.
4 Bar. 651.
Hawk. 68

Of the Construction of Statutes.

Court adjudged that this did not extend to him who stole but one horse. this rule does not seem to have been understood as it ought to be, To understand the rule it must be remembered that penal Statutes are to be construed strictly against the subject, but equitably for him. If he is within the letter of the Statute, and not within the reason of it, he cannot be punished under it, The true meaning is this, you cannot consult the reason or spirit of a Statute to bring the subject ~~out~~ within it, within the letter of it, but you may consult the reason of it to bring him out of the letter of it. It is a rule that the penal code shall be construed favorable to the subject. - - - - - - -

It follows then from what has just been observed, that no person can be subject to the provisions of a penal Statute unless within both the letter and spirit of it. For example. A Statute declares that any person who commits a certain act shall be guilty of Felony. now if an idiot does this act he is not guilty of felony. - - - - - - - - - - - - - -

And indeed it is a general rule that any universality of expression in a Statute does not include any person legally incapable — Thus if a new Statute is made containing ever so general expressions, infanti, idiots &c are not included unless particularly named.(1) - - - - - - -

The rule that ~~principal~~ penal Statutes are to be construed strictly against the subject has not been uniform — Thus the Statute 25. Edw. 3. declares it treason for a Servant to kill his Master ~~Wife~~. ~~the servant tho clearly not within the letter of the law, was by this~~

Remarks...

(ii) one reason is the sovereign is the party offended and relief must be had from its own laws —

1 Hen. Bl. 123.
3 Term. 799.

Of the Construction of Statutes. — —

The Court extended this to the Servant who killed his Masters Wife. The Servant tho clearly not within the letter of the law was, by this decision brot. within the reason of it. . . . . .

It is a general principle that the penal Laws of one sovereign State cannot be taken notice of in an other sovereign State, so as to subject the citizens of other States in this State.(k) — If a Murder is committed in Con. and the offender flies into an other State, he cannot be there punish=ed; but must be brought back to the State whose laws he has violated. If the State (who must be a party in the suit) should prosecute the offender before the Courts of an other State it would be degrading herself to the rank of an individual; and besides, the other State would not take cognizence of it. . . . . .

The penal Laws of a Sovereign State are therefore local. And hence it is that an act of confiscation in one State cannot affect the parties rights in an other. This holds between the different States of this Union as well as between us and any European Country. — This question was agitated in the case of Skillogg vs Baldwin before the superior Court of Connecticut and from thence came before the Supreme Court of Errors who merely said that the Common Law principle was a dangerous one; but did not in any way impun it. . . . . —

Every sovereign State in this Union is as to this State a foreign State. It is not oceans seas, mountains, or rivers that makes a State a foreign one but the sovereignty of it.

Remarks....

1 Rod. 52.
163.

1 Hawk. 160.
1 Bac. 651.
1 Hale. P.C.
224. 670. 684.

1 Vent. 300
3 Bla. 430.
3 Inst. 381.
3 Co. 7.
1 Co. 123.
11 Co. 71.
Plowd. 365.
Pow. Dev. 140, 1.
2 Bac. 630
4 Dac. 649.
650.

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It is a rule that when a penalty has been repeatedly incurred by the continuance of an offence, only one can be sued for at a time, as the penalty of 3/ per week given by our Statute for overflowing the lands of another. Here the penalty for one week only may be sued for at a time. The penalty is given for continuing the nuisance each week & to oblige him to remove it, and if he is prosecuted for the first week and the penalty recovered of him it will generally produce the effect which the law intended. viz a discontinuance of the nuisance . . . . . .

Again. It is also a rule that if the repetition of the offence incurs an increased punishment the person is not subjected to the additional punishment or penalty unless judgment has been rendered against him for the first offence before the second was committed, for it does not appear that this second act is a "repetition of the offence" untill the Court have first rendered Judgment against him. And if it is not stated in the second indictment that he has been convicted for the first offence, this shall be punished as being the first offence . . . . . .

These rules are all founded on the idea that Penal Statutes are to be construed strictly against the offender: on the other hand remedial Statutes are to be construed liberally . . . . . .

III. "Thus where a Stat. of Edw. 3 gave a remedy against Executors this was construed to extend to Administrators and so where the Statute "de bonis asportatis" gave a remedy to Ex.. this was construed to extend to Administrators . . . .

Remarks...

(i) Because they are presumed to express precisely the in=tention of the legislature — for the words of explination must be literally taken or there might be endless construction — 13 Mod. 282. 4 Bac. 630.

(j). Different parts of a statute are so to be construed that the whole if possible may stand together — This op=plies to Contracts. Deeds, Wills, or executory agree=ments as well as statutes — Foll. 534. Coth. 396.

4 Bac. 632.
Plowd 36. 39.
Rich 215. 315.
3 Co. 82.
Pla. 44.

1 Co. 47.
1 Pla. 89.

1 Co. 63.
2 Com. 226.
19 Vin. 511.
6 Mod. 287.
Cy. Dt. 111. 115.
Tidy. 195.
1 Pla. 89.

Of the Construction of Statutes.

But tho' it is a general rule that remedial Statutes are to be construed liberally; yet a Statute taking away a Common Law remedy is to be construed strictly. Thus the Statute of limitations is to be construed strictly and not to be extended to analogous cases. - - - - - - - - -

So also the words of Explanatory Statutes cannot be extended by beyond what the letter will warrant, The same with Stat.s declaratory of the Common Law. - - - - - - - - - - - - - - - -

Where Statutes are partly penal and partly remedial the construction is to be strict as to the penal part, and liberal as to the remedial. - which will apply to the Stat. against fraudulent conveyances in Connecticut.

The different parts of a Statute are to be so construed, as that the whole Statute (if possible) may stand and take effect together. - - - -

But a saving totally repugnant to the body of the Statute is void. as if an act vests land in the King and his heirs, saving all persons rights or vests A.s lands in the K. saving A. rights, in either of these cases the saving is totally repugnant to the body of the Statute & therefore void.

Where the Common Law and a Statute are repugnant to each other the former gives place to the latter. - - - - - - - - - - - - -

So if two Statutes are opposed to each other, the one last enacted repeals the oldest one. And this upon a general principle of universal Law that "leges posteriores priores contrarias abrogant" So if an after clause of a Statute differ from a former clause, the last is to take effect

Remarks.

4 Burr. 23. 2a. 143
4 Bac. 628.
1 Bla. 90.
4 Bac 436
1 Bla. 49

11 Co. 62.
10 Mod. 118.
1 Rol. 88.

Of the Construction of Statutes. - - -

And repeals the former: for such is presumed to be clearly the intention of the Legislature, and their will or intention is the Law. This rule is quite distinct from one which has been laid down, "That a saving totally repugnant to the body of the Statute is void" For in the case of the saving prevails, there is no law made, it being inconsistant with the whole provision of the Statute. -

Every Statute is in its nature repealable. Therefore a clause in a Stat. that it shall not be repealed is void. This has been several times attempted by English Parliments but could never be effected; for a subsequent Legislature has always power to abrogate, suspend, qualify or make void any Statute made by a former one notwithstanding any words of restraint or prohibition contained in such Statute; It has been declared by an English Statute in the time of Edw. 3 that all statutes contrary to magna carta should be void, yet subsequent Parliments have repealed & ~~altered~~ altered many clauses therein, and such subsequent acts have been constantly holden to be in force. - - - - - - - - - - - -

But the Law never favors a repeal of a former Law by implication, nor is it to be allowed unless the repugnancy be quite plain: (For as Ld. Coke says) it carries with it a reflection on the wisdom of the former Parliament. - - - - - - - - - - - - - - - - - -

There are two or three rules with respect to the construction of affirmative Statutes, in which Mr. Gould does not discover

Remarks - -

2 Show. 30.
4 Bac. 641.
Plowd. 206.
10 Mod. 337.
1 Bl. 89.

2 Burr. 803.

1 Co. 63.
4 Term. 3.
Plowd. 232.

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any good sense 1st. It is said to be a maxim of law that an affirmative Statute does not abrogate the Common Law. This is not true: for an affirmative Statute does repeal the Common Law if it implies a negative of it. Suppose the Common law says that a Deft. in a civil action shall have 6 days notice: and a Statute is passed declaring that he shall have 12 days: This is an affirmative Statute and repeals the Common Law allowing but six days. — If the Common Law proceeding, and a Statute prescribes a particular remedy by a summary proceeding, the offender may be prosecuted either at Common Law or in the method prescribed by the Statute, because the sanction is "cumulative" and does not exclude the Common Law punishment.

The second rule in which Mr. Gould does not discover any good sense is:— That an affirmative Statute does not repeal an affirmative Statute. — This rule is arbitrary and in most cases unmeaning and perfectly nonsensical — For exactly the same rule may be laid down the reverse in negative terms and be equally true. It is perfect nonsense to lay down any positive rules respecting affirmative Statutes, for the intention of the Legislature is the polestar to direct you to a ~~wrong~~ true construction in this case, for the true rule see 4 Term 3 per L. Kenyon. — But these two rules were never intended to apply to express clauses of repeal: for an express clause will repeal a former Statute. - - - - - - - - -

Remarks.

12 Co. 7.
4 Bac. 638.
4 Inst. 49.
325.

2 Inst. 686.
4 Bac. 638.

Jenk. Cent.
233.
4 Bac. 638.

Of the Construction of Statutes. . .

Another rule for the construction of Statutes is; That if a repealing Statute is itself repealed afterwards, the Statute originally repealed is hereby revived: because the Legislature by removing the repealing Statute shew clearly an intention that the former should again be in force.

If a Statute has been repealed by three different Statutes, and only two of the repealing Statutes be repealed, the third continues in force & repeals the original Statute. — It can never be set up as long as one of the repealing Statutes remains. It is not probable that such an instance will often occur tho' it is possible. . . . . .

On the other hand suppose a Statute which has been repealed be revived by a subsequent Statute, the repealing ~~the~~ Statute becomes of no force. . . . . .

It is laid down as a rule that if a Statute be repealed all acts done under it while it was in force are good: But if the subsequent Legislature declare that the law was void in its creation, all acts done under it, are also void — The 1st clause of this rule is good law. — But the 2d part of it is clearly not defensible on any ground. It is a doctrine which is monstrously dangerous to society, and one which can never be adhered to without totally destroying the most valuable rights of the citizen. — for according to this doctrine, if a subsequent Legislature happen to differ in opinion from a former one & thereupon declare their act null then forsooth all acts which have been done

Remarks...

1 Hawk. 169.
4 Bac. 636.
1 Ill. Bl. 451.
1 Root. 59.

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in conformity to an existing Law of the land must by this subsequent set of Legislators, be set aside as illegal. And further, while the law continues in force & not disannulled, the civil rights of the citizen must be regulated by it, and his disobedience of it will absurdly be punished. . ~~Horrbrous!~~ ~~Horrbrous, this must be such a~~ pernicious doctrine!

It is a general rule that Statutes are not to receive such a construction as would give them a retroactive operation beyond the time of their commencement (this rule has in a number of instances been followed by many unfortunate circumstances. - - - - - - - - - - - - - -

It follows from the rule that if an action be commenced for an offence, & the Statute is repealed before Judgment and a new punishment is inflicted by a subsequent Statute, the offender must escape punishment. For he cannot be punished under the old law now repealed nor under the new one enacted since the commission of the crime. Tis therefore advisable whenever a penal Statute is repealed to insert a proviso that the Statute shall remain in full force so far as is necessary for the punishments of all violators of it ~~antecedent~~ anterior necessary ~~for the punishments~~ to the repeal — A case of this kind happened not long since in the State of New York, A man was prosecuted under the Statute for forgery, after the commission of the crime and before the trial, the Legislature repealed the Statute without making any provision for punishing such as had violated the law,

Remarks - - -

In penal statutes if a higher or lower punishment is inflicted for any given offence than was inflicted by an older statute, this stat. is repealed. If a penal stat. is made inflicting a less punishment than the Com. Law the common law is repealed. This will not hold true a converso —

Salk. 198.
1 Hal. 251.
L. R. 317.
321. 1952.
8 Term. 267.
1 Ford. 211.

Salk. 198.

Of the Construction of Statutes. . . .

and a new Statute was made inflicting a different punishment. the offender being brought into Court to be tried, the Court unanimously declared that the man must escape with impunity, for he clearly could not be punished under the old or new Law (as would be convicting him under one Statute) . . . . . .

But tho' it is a general rule that a Statute aught not to be construed as to give it a retroactive opperation, yet a covenant to do a thing lawful at the time, if indeed unlawful by a subsequent Statute it is invalidated, & the covenantor not bound to a performance; as if I covenant with a Merchant in France to deliver him there a quantity of Gunpowder, and afterwards our Legislature enact a law prohibiting the exporting of it to that Country. here the covenantor being prevented from executing his covenant, he is not bound to perform it. The Statute ought not to affect the Covenant, and indeed it does not directly do it, tho' it does virtually do it, by prohibiting such exportation. This is rather a qualification of the general rule, than an exception to it. Mr. G. says the Covenant here mentioned is considered as made under the tacit agreement that it shall be subject to the acts which the Legislature may see fit to pass. . . . . .

So on the other hand if one covenant not to do an act which a subsequent Statute makes it his duty to do, the performance of his covenant is prohibited or more technically speaking, it becomes impossible, & the covenantor

Remarks...

Salk. 198.

1 H. Bl. 65.

1 Bro. P. C. 289.
2 Ves. C. 209. 211.
2 H. Bl. 160. & 281.
1 Ves. C. 448
1 Ves. Jr. C. 209.
2 Ll. & P. Con.
4 Ki. Eqc. Ca. ab. 18. —

1 Eq. Ca. ab. 10.
Plowd. 284.
Constit. Unit. art. 1 Sec 10.

Of the Construction of Statutes...

therefore excused from a performance. As if an apprentice here should contract not to leave his Master. our Country should be invaded, and a law should command all persons under 40 & over 14 years to appear on the Frontiers of Country; the apprentice is not bound to a performance of his Covenant. . . . . .

But if a Man Covenants not to do any thing which then was unlawful, and a Statute comes and makes it Lawful, such Statute does not repeal the Covenant. . . . . .

If a contract is declared illegal by Statute and after such stat. is made a contract of the kind is entered into, a subsequent Statute is made repealing the prohibitory Statute, this does not make the contract good; for it being originally void & diseased no after act can cure it. . . . . .

If before the time at which the party is to perform his Contract the Legislature by an act, render a performance as to part illegal, still a Court of Equity will so far as consistent with the subsequent Statute, decree the other part to be performed "in specie". And I presume it would be enforced at Law, if the case is adapted to a Common Law remedy. This is decreeing according to the rule of "cypres". The rule is the same if a literal performance is prevented by the act of God.

There are two clauses in the Constitution of the United States which may be mentioned in this place. . . . . .

The 1st is that no ex post facto laws shall be passed by any State in the union.

Remarks.

1 Bl. 91.

1 Fondbl. 28.
1 Bl. 41. 91.

Of the Construction of Statutes

Which the Courts of U. S. have decided to mean penal retroactive Laws.

2. That no law shall be made impairing the obligation of Contracts. Mr. Gould knows of no decision under this clause, it is difficult to say how far the rules which have been laid down, would be adhered to here. Thus much he believes: that if a Contract was made by a Citizen of this State to export a quantity of Gun powder To France, and a war breaks out between us by which all commercial intercourse is prohibited, here he presumes our Courts would consider the Contract at an end.

It is a rule that a Statute requiring the performance of an act which is impossible is invalid. - - - - - - - - - - -

It is said by Coke that Statutes contrary to reason or the Law of God, are void. — This proposition appears to be totally indefensible. — A moralist may say that the law of nature is paramount to all other laws; but as a member of society no man can be permitted to hold this doctrine. For if this is to be the case, every Judge is to decide by the light of his own reason what Laws are contrary to the law of nature. This would be placing the Judiciary over the heads of the sovereign powers who make the Law. Whereas it is the province of the Judiciary merely to administer Justice pursuant to the Laws when made by the sovereign Power, Mr. Gould presumes that this is the true rule with respect to Statutes contrary to reason — That if there arise out of a Statute, collaterally, any absurd conse-

(l) Judges are the proper persons to decide on the constitutionality of a law. It is no more the business of the legislature to expound the constitution than to administer the laws of their own making or expound them — And it is equally as proper for the court to say that laws are repugnant to the constitution or to each other —

*and the judges are at liberty to expound the Stat. by equity also only when they disregard it.

(l) "Now" here means "must" "shall"

(m) This is not however a universal rule —

5 Term. 398.
2 Stra. 1191.
2 Hawk. 263.
374.
* 2 Salk. 609.

where Stat. directs a thing to be done "in a public nature" may it be taken as shall
2 Salk. 609.

=quences, manifestly contradictory to common reason it is with regard to those collateral consequences, void* ~~But~~ if a Legislature will positively pass an act which is unreasonable Courts of Justice are never the less bound to enforce it. -

(k.) But whether a Statute Law opposed to a written Constitution is void, is a different question, And State it to be now universally acknowledged, that such Statutes are void. If there is a repugnancy in the Statute irreconcilable with the Constitution, the Court may, and must say that the Statute is null. The Constitution is intended as a check on the Law makers. And the difference between a Constitution and a Statute is that the former is paramount to the latter. This question has been repeatedly decided not only by the Court of the United States but also by the State Courts. - - - - - - - - - - -

This subject is luminously treated of in Vol. 2 p. 290. of the papers entitled the "Federalist" written by the late General Hamilton under the signature of "Publius". -

When a Statute says that a Court* may (l) do a matter of Justice between parties, it then becomes the duty of the Court, and they must do it. Thus a Statute of Wm. and Mary declares that a Court may award Costs to a Defendant who is acquitted in a penal Action; here it was contended that the Statute by using the word "may" left it at the discretion of the Court. But it was determined not to be discretionary with (m)

Remarks...

(a) yet this has a particular qualification. for if the offence is created by one substantive clause and the new jurisdiction is created by a distinct, the court of Kings Bench is not excluded but if both are created by one clause the ordinary courts have no jurisdiction — 2 Hawk. 304. Cowp. 524. Cro. J. 643. 2 Hale P.C. 5. —

1 Hawk. P.C. 118. 9 Geo. 118. Salk. 564. 2 Burr. 1042.

2 Hob. 5. 1 Hawk. 9. Cro. J. 640. 1 Sid. 196.

Of the Construction of Statutes. . . .

the Court, but that they must do it . . . . . .

It seems to be a general rule that Courts of a general and established jurisdiction, are not to be ousted of their jurisdiction by a mere implication of Law. Thus if an English Statute make a new Law and order particular Judges to execute it. the Court of K. B. is not ousted of its jurisdiction, unless the Statute contains express words of exclusion nor by analogy would it oust the Superior Court of this State of its jurisdiction in case of a similar Statute made by our Legislature. The provision the new Statute has made is construed thus: That the new Judges are to have concurrent jurisdiction in this case with Courts of a general jurisdiction. . . . . .

But it is an unsettled question, that if a Statute creates a new offence and establishes a new jurisdiction, whether the Courts of ordinary jurisdiction are to be ousted. I say it is a question because Hale and Hawkins so consider it. Mr. Gould supposes that the Courts of ordinary Jurisdiction ~~are not~~ ~~are not in this case~~ have no authority to take cognizence of it. The courts of ordinary jurisdiction are not in this case ousted of any jurisdiction already vested in them, but merely excluded from a participation with the new Court in the trial of a new offence, (or) as these courts of ordinary jurisdiction never could take cognizence of this offence they are ousted of nothing nor any thing taken away from them.

Remarks.

4 Bac. 642.
3 Mod. 13.
10 Co. 30.
Hob. 211.
3 Term. 894.
4 Dr. 810.
3 Inst. 113

Cowp. 36.

Bearg. Ld.
Pulle. 229.
6 Co. Lit. 101. b.
2 Burr. 1017.
3 Term. 393.

2. Atk. 212.
1 Burr. Ld.
Pulle. 236, 7.

Of the Construction of Statutes...

It was formerly a question (tho' it is now settled) that if a Stat. authorizes a body of men to do acts by vote of a majority, & constitutes a certain number of these men a quorum, here a majority of the quorum is not sufficient to take a vote, unless it is a majority of the whole number of men composing the body. . . . . .

An authority confered by Statute on two or more individuals is joint, & not several unless so expressed, and therefore if one dies the survivor or survivors cannot execute the authority. As if A.B.& C. are authorized to sell an Infants property, here neither one nor two of them can do it, but all must join. And so was the decision in S. Root 67 where the Assembly appointed two persons trustees to an insolvent debtor, one died & the Court said that as the authority was joint, no authority was left in the survivor. . . . . .

But if a power of a public nature is given to several the act of the majority, if all be present is binding on the whole, As if A.B.& C. are appointed Commissioners for a Public purpose and all are present, if A.& B. agree to a certain measure, and C oppose it still it is good and binds the whole, C as well as the rest but if only two are present they cannot bind the other who is absent. . . . . .

But in the case of Corporations, properly so called, a majority of those who are present can bind the whole Corporation In the case of Corporations the authority is not usually confined to A.B.& C.

Remarks.

(o) Every statute is or ought to be construed alike in both courts - the only difference between these as to this subject is, that the mode of relief & mode of enforcing the law is different -

1 Bl. 87.
3 Co. 39. b.
Cro. C. 207.
2 & 3 Term. 606.
7 Ch. 310.

1 Ambl. 22.
3 Bl. 438. 1-
439.

Of the Construction of Statutes. ...

But to A B. C & those who may happen to associate with them. ...

It is frequently said in our Statute Book that certain Contracts shall be void and that others shall be voidable. Now by a void Contract is meant one which is ab initio void, and in contemplation of law is, as if it never had existed. and by a voidable Contract is one which is good till set aside by due course of Law, and of course all done under it before it is set aside, is good. The distinction between void & voidable Contracts may be well exemplified by the case of Infants Contracts, see title of "Parent & Child". The true criterion with respect to void and voidable Statutes is this: If the object of the Statute would be defeated by regarding the act called void in the Statute as voidable it must be construed void; but if it can be preserved by construing it voidable. then it may be so construed. Ex gr. A Statute of Eliz. prohibits Bishops from makeing leases longer than three lives or 21 years — The object of the Statute was to prevent the impoverishment of their successors a action was brot. against the Bishops lessee during the Bishops life to recover back lands leased for a longer term than 3 lives or 21 years. But the Court held it not maintainable because the object of the Stat. did not require the lease to be considered void during the Bishops life. Our Stat. agt fraudulent conveyances may assist in exemplifying the above rule Statute 217. .. - - - - - - - - - -

In closing the remarks on the rules of Construction it may be observed that their rules are the same in (o) Equity as at Law. The remedy or mode of relief to before, is different. The object of both Courts is to discover the will of the Lawmaker,

Remarks

3 Ph. a. 221.

Of the Construction of Statutes. . . .

which is to govern in both. The difference found in the Books between the constructions given in Courts of law, and in Equity, is no more than what you will find between different sets of Judges in Courts of law. . . . .

Of Pleading Statutes & the order of Prosecuting under them. . .

I would premise that there is a difference between pleading a Statute reciting a Statute and counting upon one. Merely pleading a Statute, is nothing but stating the facts which bring the case within it. Therefore in pleading it is not necessary to quote the words of it, or even mention the Statute. Thus when in England a Deft. would plead the Statute of limitations (21 Jac. 1) in bar to an action of Assumpsit, all that is requisit is "non assumpsit infra sex annos". Sometimes they plead it by saying that the promise was made six years before the date and impetration of the Plaintiffs Writ. in neither of these modes of pleading is the Statute mentioned or alluded to. The most Lawyer like mode of pleading the Stat. of Frauds & Perjuries is that there is no note or memorandum in writing.

Counting upon a Statute in pleading, consists in an express reference to it as against the form, force and effect of a certain Statute entitled" — Thus if a Suit is brot. on a Statute you state the facts of which the D. stands guilty then that these are contrary to the form, force &c. (as above) . . . .

Reciting a Statute is quoting its contents. It is not unfrequent for Lawyers out of abundant caution, to recite a Statute in pleading

Remarks

4. Co. 76.
19. Vin. 490.
Hob. Co. 57.
Cro. E. 236.
2 Mod. 57.

Stat. Com. 342.

Of Pleading Statutes & the order of Prosecuting under them.

tho' it is not necessary. But the practice prevails to a very great degree in Connecticut. Of all ~~Public Statutes, Courts of Justice are bound~~ public statutes courts of justice are bound to take notice "ex officio" tho' there are some exceptions to the rule. . . .

On the other hand Courts are not bound to take notice of private Statutes unless they are pleaded, in aid they can't do it; whereas of for of these they are not supposed to have any knowledge; whereas of public Statutes they are for they are the laws of the land with which they must be thoroughly acquainted in order to execute the duties assigned them. . . . . .

In Connecticut a private Statute (as well as a public one) may be given in evidence under the general issue — For here, our Statute allows every thing to be given in evidence under this plea "except a Discharge from the Plaintiff or his accord, or some other special matter whereby the Deft. by the act of the Plaintiff is saved or acquitted from the Plaintiffs demand". . . . . .

But even in Connecticut private Statutes must be read when given in evidence under the general issue, but public ones, need not; for the Court or Jury can have no knowledge of the former's contents, unless read, whereas the latter they are supposed to know. This reading of private Statutes is a characteristic difference between these and public ones. . . . . .

Mr. Swift in his System of the Laws of this State, says that the

Remarks. —

Hon. Bl. Doug.

Non est factum may be pleaded to a deed that was once the party's deed 5 Co. 119 b.

4 Co. 76.
10 Co. 57.

Of Pleading Statutes & the order of Proceeding under them.

Statute of limitations must be plead here and cannot be given in evidence under the general issue of non assumpsit this says Mr. Gould is not true. The reason assigned by Mr. Sw. is that it would acknowledge the promise & contradicts his plea. but does not our Statute say that every thing may be given in evidence under the general issue except (see quotation from the Statute in the 1st. continue of this page)? and does the Stat. limitations come within that exception? Clearly not. — Again it is a well established rule of Law that a plea of non assumpsit does not mean that the Defendant never assumed & promised, but that he is not at this time liable. . . . . .

In Connecticut a Defendant is not bound to plead a private Statute by way of defence, but may give it in evidence. But in Connecticut (as well as in England) a plaintiff must if he brings an action on a private Statute, declare on it as he would on a bond. . . . . .

When the rules of pleading (which will be mentioned hereafter) require a public Statute to be pleaded it is not necessary that it should be recited.

But it is not only necessary for a party to plead a private Statute in England and Connecticut, but he must recite its provisions. The Court to form their Judgment from what appears on the Record & unless the provisions of the private Statute are there recited how shall they know its contents? . . . . . .

Tho' it is not necessary to recite a public Statute, yet if a party pleading

Remarks...

(p) The reason is if the advantage is not taken in the pleadings the judges are not supposed to know the defect or misnectah — Judgment of course can not be arrested —

Cro. El. 245. 236.
19 Vin. 508.
* Sought 90.
L. R. 382.
Cro. J. 376.
196. 522.

(q) He may plead in abatement or pray oyer and spread the st. upon the record and demur — The mode indeed is precisely the same as that of taking advantage of a misnectat in a deed

1 L. Ray. 382.
2 Mod. 241.
1 Ra. 956.

4.
5 Co. 59. 119.a
7 Salk. 391.
Hob. 72.
227.

4 Co. 76.
2 Mod. 57.

1 Co. 76.
Hob. 227.

1 Com. 230.
3 Co. 33.
4 Bac. 658.
658.

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it undertakes to recite it, he must recite it correctly, or (as some say) it is not ~~and~~ cured by verdict. Lord Mansfield says if a defendant unnecessarily undertakes to recite a Statute he will hold him to "half a letter". Holt and several others say that if the misrecital is in an immaterial part of a Statute, it is aided by verdict. Mr. Gwyn says that the current of authorities are that the misrecital is fatal. - - - - - - - - - - - - - - - -

But on the other hand the misrecital of a private Statute, when the necessary to be recited, is aided by verdict, or Demurrer.(p) - - - - - - -

If a private Statute is misrecited the opposite party should plead nul tiel record, or allege that it is further enacted &c. (q)

According to the rule of Common Law a public as well private Statute when it is used to defeat a specialty must be pleaded specially — But in Contr. when the Stat. against usury is intended to be made use of, to defeat a specialty, it may be given in evidence under the general issue.

In declaring on private Statutes, it is necessary to recite them substantially tho' not verbatim. If the recitation purports to be verbatim, it must be correctly recited. - - - - - - - - - -

When a Statute is in part public and in part private, there is no need of reciting the public part, but if a party in a suit would avail himself of the private part, that part must be recited. - - - -

It is never necessary to recite the title or preamble of any Stat. either public or private; And the reason is that they form no part of the

Remarks.

L. Ray. 77.
6 Mod. 62.

1 Com. 231.
2 Hawk. 246.
Cro. J. 211.
19 Vin. 307.
Cro. C. 232.

8. Co. 28.
4 Bac. 655.
Cro. C. 355.

8 Co. 28.
4 Bac. 655.
Cro. C. 355.

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Law. The preamble is nothing more than the motives which led the legislature to pass the act, and the title is merely the name given to distinguish the act from the others. . . . . .

And it being considered unnecessary to recite the Title it was holden that the mis recital of the title of a public Statute was not fatal but by a late decision in 6 Modern, it is fatal — Mr. G. finds but two decisions as to this point in the books; the first in point of time is in Ld. Raym. that it was not fatal. The latest as I have mentioned is in 6 Mod. that it is fatal: He inclines to believe that the latest will be adhered to, and considered as the Law. . . . . .

In England where the recital of a Statute is necessary; the party pleading it, must give the date if it and the place when it was enacted otherwise it will be ill on demurrer. But in Connecticut we never mention either the date or place where it was enacted nor always the Title. . . . . .

When a private Statute is pleaded, the existance of it may be put in issue by the plea of "nul tiel record" and the question may then be tried whether there is in fact any such Statute . — — — —

But it is otherwise of a Public Statute, For to this, nul tiel record cannot be pleaded, which goes upon this principle that the Judges are bound to take notice of a public Statute . . . . . .

It is a general rule that in declaring on public Statutes it is not

Remarks.

19 Vin. 503.
1 Bac. 38.
Garth. 382.
Croke Eli. 601.

Lutw. 584.
4 Bac. 18.
1 Com. 230.

2 Hawk. 356.
357.
Plowd. 206.
19 Vin. 505.
7 Com. 521.
2 Hawk. 257.
Keling. 32.
1 Vent. 103.
2 Lev. 333.

19 Vin. 504.
4 Bac. 655.
656. Salk.
505. Holt
534.
2 East. 534.

19 Vin. 502 L.
Eq. 85. 6. 85. a. l.

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necessary to count on the Statute, whether the offence be such only because prohibitted, or be evil in its own nature or whether it be prohibitted by more than one Statute, or by one only: for the Court are bound ex officio to take notice of them. But to this rule there are some exceptions.

1st If there is likewise an existing remedy at Common Law, if the action is brought on the Statute, it must be counted on. For without such counting the Court cannot discover whether the party means to pursue the Common Law remedy or the Statute. ———

2d And it seems that where an action is brought on a penal Statute it must be counted on, tho' the Statute is a public one. Mr Gould cannot discover the foundation or principle of this rule, and he supposes it has grown merely out of usage: as it has always been the practice to do it, There certainly can be no necessity for this rule, for a penal Stat. is as much known to the Judges, as any other public Statute. - - -

3d And it is settled as a general rule that if a public Statute gives a new species of action which was unknown at Common Law, it is necessary to count on the Statute: and indeed Bacon says it must be recited. Thus in the action of Waste founded on the Statute of Gloucester to recover the place wasted, this being a new species of action to recover land, it is necessary to count on the Statute. Neither does Mr Gould see the reason for this rule - - - - - - - - - - - -

But where the Statute extends an old remedy to a new case, it is not

Remarks

* For the latter does not create the law but merely gives a longer duration than it had by the former, but the former contains the law — 2 Bac. 499. 443. 1 Com. 230.

(2) It is a rule in pleading that an offence may in the same indictment be laid to be done both against Com. Law and Stat. — But this must be done in two counts — for where there are two counts the Court supposes they refer to distinct offences of course where it is doubtful whether the offence is against the stat. or Com. Law it is prudent to count upon both or rather to count upon the Stat. for it is not necessary to count upon the Com. Law. It cannot be found bad in one count for it would then seem that the person was prosecuted both at Com. Law and upon the stat. for the same offence which cannot be done. Salk. 212. Earth. 382. Plowd. 206. 19 Vin. 305. 4 Bac. 436. Stra. 1066. 4 Bac. 638. 656. 8 Term 362. 363. 5 Ac. 162. 2 Hawk. Ch. 25. ss. 115, 6. 2 Will. 376. 6 Co. 38 a. b. 4 B. 5 Com. 235.

(11) If any contract or agreement good at Com. Law unwritten is by the stat. required to be in writing it is not necessary to count that it is in writing for this may appear in evidence — the 12 Mod. 540. 5 Bac. 656.

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necessary to count on it. As the Statute of England enabling Exr. to bring trover or trespass for goods of the testator taken away or injured in his life time.

So also when a public Statute ~~does not create any new~~ is purely remedial it is not necessary to count upon it. - - - - - - - - - -

So also where the Statute does not create any new remedy, but merely gives the benefit of the Common Law it is not necessary to count on it. - -

If one Statute prohibits an act, and a subsequent Statute inflicts a penalty on the person doing such act, he who sues for the penalty must count on both Statutes - - - - - - - - - - - - - - -

When a temporary Statute which has expired, is continued by a subsequent Statute it is sufficient to count on the former without noticing the latter.* - -

(a) In a prosecution for a Common Law offence when there is no Statute prohibiting, if the indictment concludes "contra forma Statuti", these words may be rejected as Surplusage. There being no Statute on the subject ought not to vitiate the indictment, & it being an offence at Common Law, it shall be deemed a prosecution under that Law. - - - - - - - -

If writing is necessary to the validity of a Contract at Common Law, it is necessary for him who pleads it to aver it to be in writing - - - - -

Once more If a Statute make writing necessary to the validity of a Contract unknown at Common Law, it is necessary in pleading it, to aver it to be in writing. (b) - - - - - - - - - - - - - - -

This is necessary in pleading a Devise of Lands: it must be shewn to be

Remarks

(2)

But in an other part of this stat it is said all prosecutions for a breach of this law, must be brot within two months — The information need not state that the acts were committed within two months — This rule is not an arbitrary one and is founded on this reason, that the exceptions in the enacting clause enter into the description of the offence — In the other (last) case it is a mere matter of defence on the part of the Deft —

1 Term. 141.
1 Burr. 152.
6 Term. 559.
Sd. -27.
Sd. 542.
1 East. 646
2 Mod. Notes 544.

(1.) bot. rev.

statute introduces a new rule of evidence but has not altered the rule of pleading at Com. Law As in the case of Stat. of Frauds and Perjuries which requires should be solely proved by writing —

2 Hawk. 302 note
2 Burr. 799.
Cowp. 648.
Salk. 45.

Moore. 750.
2 W. Bl. 900.

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in writing, as writing was first made requisite to its validity by the Stat. 32d. Hen 8. And it must also be shewn that the requisites made necessary to the validity of such a Will by the Statute 29 Car. 2d have been complied with.

It is necessary that exceptions in the enacting clause of a Statute which creates an offence and gives a penalty, must be negatived in the declaration or complaint of the person prosecuting on it, & the omitting so to do is fatal: But if the exceptions are contained in a clause subsequent to the enacting one, the omitting to negative them is not fatal. the reason why it is requisit to be done when contained in the enacting clause, is that, when found there, the exceptions are part of the discription of the offence, As if the Statute should declare that all persons (except Ministers of the Gospel) who are guilty of profane swearing should be subject to a fine of $50. Now in prosecuting under this Statute the exception contained in the enacting clause must be negatived by saying that the Deft. is not a Minister of the Gospel. . . . . .

Where there are two subsisting remedies, one at Common law, and one under a Statute, either may be pursued; and if one is barred the other may be pursued, the remedy given by the Statute in such case is called "cumulative" . . . . . .

And further. In case of two subsisting remedies one under the Stat. & one at Com. Law, if a Plff. brings his action on the Stat. expressly & yet by reason of some requisite in the Stat. varient from the Com law. he cannot prove his case agreable

Remarks.

2 Bur. 803.
834.
4 do. 2329.
Cro. J. 644.
Salk. 45.
7 Co. 36a.
6 Mod. 86.

2 Hawk. 302.
1 Bar. 554.
4 Term. 205.

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thereto he may prove his case agreable to the rules of Common Law & recover in this suit as tho' he had brought it at Common Law. Ex. gr. The Common Law if another is injured in his property trespass lies to recover damages. Suppose a Statute declares that if the fact can be proved by three witnesses, he shall recover triple damages he may prove it by a less number & recover his single damages. - -

And the same rule holds in publick prosecutions. This is however contradicted by Ld Hale & by a decision in Cro. Eliz. but more modern decisions are agreable to the rule as laid down. - see 1 Hawk. 214. 2 d^o 302 356. Salk 212. 2 Ireb. 138. - old authorities contra viz. Cro El. 231. 307. 697 5 Co. 99. 2 Hales Pleas of Crown. 71. - - - - - - - - - - - -

If that, which was no offence at Common Law, is made so by Statute and a particular mode of prosecution is pointed out by the Statute, that mode only must be pursued — Thus if a Statute is made declaring that some indifferent act should be felony, and that the felon should be prosecuted by indictment; here he could be punished in no other way, whatever modes there may be at Common Law for prosecutions in analogous cases. — This is the general rule, but it admits of some qualifications and indeed the rule holds in only two cases. - - - -

1st Where the particular mode is prescribed in the prohibiting or enacting clause, the rule prevails. - - - - - - - - - -

2nd Where there is no prohibitory clause, but the Stat. that whoever does such an act shall be prosecuted in this particular manner, this mode only can be pursued. - -

Remarks

4 Term. 205.
2 Hawk. 302.

2 Burr. 803.
805. 804.
4 Term 202.
2 Hawk. 302.

1 Burr. 344.
10 Co. - 75.
6 Mod. 26.
19 Vin. 512.
518.
Cro. El. 655.

2 Hawk. 265.
4 Bl. 2. 5. 6. 7.

2 Term. 47.
190. 205.

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But if the particular mode of prosecution is prescribed in a separate substantive clause of the Statute, then this particular mode need not be pursued, but the Common Law mode may be pursued. . . . . .

So also if the act which is prohibited by Statute is an offence at Common Law, the particular mode prescribed need not be pursued, The Statute here intends to give the party his choice of the modes of prosecution. . . .

If a Statute creates a right or an offence and furnishes no remedy, the Common Law will lend its aid to enforce the right & punish the wrong. . .

Where the Statute merely gives a civil right, it is said that the action must be brought on the Statute: here the Statute furnishes the right, and the Common Law the remedy. . . . . .

Of Prosecutions under Penal Statutes.

Regularly no public offence can be prosecuted by an individual in his own private right and capacity. . . . . .

In England all crimes or public offences are prosecuted in the name of the King; and in Connecticut in the name of the State. The King represents the public in the former Country, and the State in the latter. The party injured regularly prosecutes for the wrong. . . . . .

In England private persons do prosecute for small public offences in the name of the King, but then it is done merely for the purpose of obtaining Costs, tho no part of the penalty goes to them. It seems that indi

Remarks

6 Mod. 27.
Hom. 229.
230.

1660 79 $\frac{6}{..}$
2 Inst. 557.

3 Lev. 290
Co. Lit 239.
189.

Poph. 175.
4 Bac. 658.

Of Prosecutions under Penal Statutes.

viduals are not allowed to prosecute in this way for heinous offences. Indeed there are no particular rules to be found with respect to the right of individuals to prosecute. . . . . .

If a Statute is violated which prohibits or commands any thing for the advantage of an individual he can prosecute in his own private right . . . . . .

If an individual is personally injured by an act which is a public offence, he has his right of action on the Statute for his private injury altho nothing is said in the Statute concerning his civil remedy; and the Statute is good evidence in his favor. —

If a penal Statute gives a two fold remedy, the public remedy is of course inflicted by a conviction of the offender at the private suit of the individual injured. — When a Statute inflicts a penalty or forfeiture for dispossessing another of his right of any kind, the person injured, not the public has his remedy. —

When the Statute prescribes no particular form for recovering a penalty inflicted, the proper action is debt. . . . . .

Qui tam Actions

These are a sort of actions called by the name of qui tam actions from some Latin words, which were in the writ when the pleadings were in that language. viz "Qui tam pro domino rege et se ipso" — This is an action brought by an individual on a penal Statute

Remarks

3 Ma. 151. 2
4 Ma. 308.

2 Vaus. 265. 4
1 Bol. ab. 1.
Cro. El. 877.
Cro. J. 360.
832.

3 Bl. 160.
2 Vaus. 263.
1 Com. 229.

Rac. ab. 37.

Qui tam Actions.

partly for himself and partly for the public . . . . . .

Qui tam actions are carried on by civil process. Qui tam informations by criminal process. . . . . .

Qui tam prosecutions are of two kinds 1. Qui tam actions & 2. Qui tam informations. – Their difference consists merely in the form of the process.

The Connecticut qui tam complaints are accompanied by a forthwith process, are properly qui tam informations. Qui tam prosecutions are mere creatures of penal Statutes & not of the Common Law. Indeed they are scarcely known at Common Law. . . . . .

A popular action is one given by Statute to any person who will sue for a penalty incured for a violation of some penal Statute. It is called popular because it is given to any person who will prosecute. . . . .

Many Statutes give only part of the penalty to the person prosecuting to conviction; in which case it is also called a popular action . . . .

When the whole of the penalty is given to the individual prosecuting, he may bring his action without joining the King or public; for if he is to receive the whole penalty it certainly is useless to join the Public But still the usual mode is, to join the public in both cases, whether the whole penalty is given to the individual or half of it.

A popular action then is not necessarily a qui tam action for where the whole penalty is given to the prosecutor, he need not join the Public . . . . . .

Remarks

4 Bac. 653.
2 Inst. 55.
74.
1 Co. 75.

3 Lev. 290.
Co. Lt. 139.

Dyer. 95.
4 Co. 19.
1 Com. 228.

Qui tam Actions...

Neither is every qui tam action a popular action; For the penalty inflicted for the violation of the penal Statute may be confined to the party injured only; and in this case, it may be a qui tam, tho' not a popular action. . . . . .

If an individual is civilly injured by an act prohibited by the Statute he may have his action or remedy on the Statute, even tho the Statute does not expressly provide one. . . . . .

So also if a Statute prohibits or commands an act for the benefit of an Individual, that individual has of course an action on the Stat. for an injury occasioned by its violation. Here the remedy is implied merely and not expressed. . . . . .

Again – when a Statute inflicts a penalty upon one for dispossessing another of his right of any kind, without making any appropriation of the penalty, he who is injured & not the public, shall have the benefit of the penalty. This rule is also laid down under "Prosecutions under Penal Statutes" these are instances in which some individual is supposed to be injured. . . . . .

If an injury prohibited by Statute is immediately injurious to the public only, yet if the Statute give part of the penalty to an individual, he may have an action. . . . . .

So also if a Statute prohibits a certain act but does not give any penalty the action must be a qui tam and not by the party alone –

Remarks....

1 Bac. 37.
2 Hawk. 265.
377.

2 Hawk. 377.
1 Com. 228, 9.
4 Co. 73.
12 Co. 134.
Cro. J. 114.

2 Swift. 182.

4 Bac. 11.
6 & 7 191. 3.
Salk. 636.
2 Bac. 506.
Stat. Com. 191

Qui tam Actions

as upon the Statute 32 Hen. 8. which prohibits suing for the gross bus. or upon the Statute 2d. Rich. 2d de scandalis magnatum, so upon the Stat. of Usury, so upon the English Statute of Appeals. - - - - - -

But where the offence is immediately injurious to the public only, no individual can bring a qui tam or popular action unless the whole penalty or a part of it, or a sum certain in money is given to the individual. - - - - - - - - - - - - - - -

All penal Statutes which give the whole or part of the penalty to the party prosecuting deviate from the common Law rule - - - - -

The cases then in which these prosecutions will lie are 1st. When the Statute prohibits an act immediately injurious to an individual and does not give him any remedy: 2d. Where the Statute prohibits an act immediately injurious to the Public & gives a remedy by part or the whole of the penalty, the individual may prosecute. - - - - - - - -

In Connecticut, qui tam actions may be brought for breaches of the peace - false imprisonment - perjury - theft - assault & Battery and forgery. -

It seems to be a rule of the Common Law that when a fine or remedy is given to the public by Statute and also a civil remedy to the party injured, the penalty of course is given upon conviction in the civil suit. This rule however is not ordinarily enforced - In Connecticut the Courts will not inflict the penalty unless the Plaintiff

Remarks

2 Lev. 252.
Poth. 173.
Barth. 92.
Esp. 7.

3 Bl. 167.
2 Black. 268.
275.
1 Ves. 65. a
662.
7 Term 336.

Qui tam Actions.

in the civil suit, moves for it. The rule is the same when a action is brought for a breach of the peace on the Statute. . . . . .

So also in the case of vexatious law suit, if then a civil action is bro'. the Court may inflict the penalty ~~unless the Plaintiff~~ but in these cases the Court holds that they are not bound to do it of course. . . .

When no form of action is prescribed in the Statute for the recovery of the penalty, the proper and most appropriate action is that of debt. It has been decided in Connecticut, that the action of Indebitatus Assumpsit will lie. . Mr. Gould knows of no instance where this action has been brought in England for offences against public Statutes. but it is their ordinary action to recover a penalty inflicted by bye Laws: which penalties are called amercements. . .

When a penalty is given by Statute partly to the King or public, and partly to the individual prosecuting, the King or public may prosecute & recover the whole penalty. And in this Country the rule holds good as applied to the public & individuals, & the reason is, this part of the penalty is given merely from motives of policy to aid in detecting offenders. . . . . .

A bona fide conviction on a qui tam prosecution or information is a bar to any after prosecution for the same offence. Hence if a Qui tam prosecution is commenced and the Deft. is convicted, the public can never after prosecute for the same offence. but if it should

Remarks.

2 Hak. 275.
Cro. E. 677.
3 Burr. 1422.
1 Kac. 37.
2 H Bl. 310.
2 Bl Com. 437.
Ina. 1169.
3 Burr. 1423.
2 Hawk. 275.

2 Bl. 437

2 Hawk. 275.
3 Inst. 194.

2 Bl. 437.
Cro. El. 198.
11 Co. 68.
Hutt. 82.
1 Com. 229.

Qui tam Actions....

appear that this conviction was obtained by collusion, it would be no bar but the public might prosecute . . . . . .

If the public have prosecuted & the offender is convicted (in which case there can be no presumption of mala fide) no individual can afterwards prosecute for the same offence . . . . . .

A suit in England is considered as pending from the time of purchasing the writ & in Connecticut from the time of service. A person claiming a penalty under a penal Statute has no right to it till he has commenced a suit. When a Statute inflicts a penalty & gives the whole or part, or the whole to the prosecutor, this is regarded as an hereditas jacens. The first occupant is intitled to it; and the first act to recover it, is by commencing a suit. He then who first commences a suit to recover the penalty, acquires an inchoate right to it & on the recovery of Judgment, his right is consummated . . .

It follows from the rule last laid down that in England, the King by releasing the whole penalty before the individual sues bars the individual from recovering it, whether the whole or part of the penalty goes to the King . . . . . .

It also follows from the rule laid down, that when part of the penalty is given to the individual ~~has actually~~, and part to the King tho' the individual has actually commenced a suit. the King may release his part of the penalty, and that part only. for by commencing

Remarks

2 Bl. 437.

Noy. 100.
Moor. 58.

2 H. Bl. 311.

2 Hawk. 276. 9
5 Term. 98.

Qui tam Actions. - -

the suit the individual has made the popular action his own private action, & it is not in the power of the Crown to release the informer's interest.

It is said by Sir William Blackstone that after the common informer has commenced his suit, that Parliament may release the whole as well that part which belongs to the King as what belongs to the individual. This is done by virtue of what the same learned Commentator calls the "omnipotence of Parliament". - - - - - - - -

But where the whole or a part of the penalty is given to the party agrieved, the King cannot even before action brought release that part which goes to the individual, for this is a remedial Statute and intended to give the individual a remedy for his civil injury. -

The reason for this doctrine is that in the latter case the individual has a right to the penalty before the action is brought, whereas in the former case, his right does not commence till after the action is brought. - - - - - - - - - - - -

At Common Law it seems that the prosecutor might after conviction release his part of the penalty. - - - - - - - -

By the Statute of 4 Hen 7th. no covinous recovery would be a bar to any other action for the recovery of the same penalty. As this is an Antient Statute, We could suppose it would be considered as the Law of Connecticut. - - - - - - - - - - - - - - - -

By Statute of 18th Eliz. it is enacted that the Plff. in a popular

Remarks.

(5)

It is to be observed that several acts committed in continuity at the same time is but one offence and is so punished — As a breach of the sabbath be. Here there is but one offence tho' the person labor unlawfully thro' the whole day —

Stra. 167.
Poll. 18.
3 Bl. 162.
1 B. & Pul. 13

11 Co. 65 b.
64 a. b.
8 Co. 48 b.
3 Bl. 162.

Moor 453.
Foy. 60.
Cro. El. 480.
Salk. 192.
4 Term. 809.
Bul. N.P. 18.
Cowp. 610.

Bac. 42.
Sil. 519.
Salk. 206.
Pulter L. of Costs. 200.

Qui tam Actions...

action shall not compound the prosecution with the Defendant at all till after answer made & not even then without leave from the Court. This is intended to prevent fraud, on the Justice of the State...

It is a rule that if the plaintiff in the popular action dies, releases the penalty, withdraws the suit, or suffers a non suit the public may proceed & prosecute it to conviction, that is, the public may take up the same prosecution which the individual has commenced, & go on with it, or may abandon that, & commence anew...

If several persons are convicted of an offence in a popular action only a single penalty is inflicted on, & recovered of, the whole; But in a public prosecution a distinct penalty is laid upon each of them. If then an individual prosecutes, only one penalty is recovered. But when the public prosecutes a penalty is inflicted on each Deft. The reason of the difference is said to be that popular actions are founded on contracts, while public prosecutions are founded on crimes. Mr. Gould cannot discover that the true ground of the action has its foundation any more in Contract than in any thing else, he thinks that the distinction has grown entirely out of the form of prosecution.(6) . . . . . .

In popular actions the Plaintiff or Prosecutor is entitled to no costs unless the Statute inflicting the penalty expressly allows Costs. But when the penalty is given to the party aggrieved this being

Qui tam Actions.

a remedial Statute, he recovers Costs as of Course: — & the reason of the difference is very obvious, in the former case he does not sue for an injury, whereas in the latter he does. - - - - -

In Connecticut he recovers Costs in both cases - - - -

Baron & Feme

Baron and Feme.

Of the right of the Husband to the property of the wife.

The general principle which regulates this law concerning this branch of it, is the duty of the husband which is to provide necessaries and protection to the wife – on this principle it is, that he is entitled to the property of the wife, so far as he is –

Of the Wife's Moses in possession.

A man by marriage acquires an absolute right to all the wife's personal property in possession, by a legal transfer as it may be styled – Co. Lit. 351. 1 Bac. 239. 1 Com. 555. 556. 1 Salk. 115. 1 Roll. 342. –

The fact of the husband's becomming thus possessed of this portion of the Wife's property, does not lay him under any stronger obligations to discharge her debts, than that at the marriage he had not received a cent. and it is highly proper that the Husband should be answerable for the debts of his wife, as by the marriage he takes to himself all the property, and thus wholly disenables herfrom cancelling her debts – And the propriety of his becomming answerable for these charges, is still more striking when it is recollected that all the personal chattels which the wife acquires, and becomes possessed of during coverture, become

Remarks

1 Roll 342. Mon.
342. 2 Mod —
186.

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immediately the absolute property of the Husband. And it is obvious that in this business of paying debts, we must not look upon the Husband in the same point of light as we do an Ex^tor or Ad^tor who pays only to the extent of assets.

However it must be noticed that the Husband is no longer liable for the debts of his wife, than during coverture. Explained by example. A. marries B. who brings him $5000 and owes $500, B. dies within a short time; there $500 cannot after the death of B. be collected out of A., altho' they might have been at any time before her death. and yet if A had died in the stead of B., the $5000 would have gone to his representatives and the $500 have been left for B. the wife, to pay for her debts always remain her own, for altho' the Husband during coverture is compelled to discharge them, still it is plain that they are her debts and not his.

Of the wife's choses in action.

To the wife's choses in action, Viz. notes, bonds, &c. the husband acquires a disposal or a reduction a right of disposal, or reduction to possession, at any time during coverture, and by reducing them to possession he becomes vested with an absolute right to them.

Remarks

There is one chose in action given to the husband by Stat. 32 Hen. 8. as where there is rent arrear due to the wife for a farm leased — the rent arrear will go to the husband — Co. Lit. 351 — contra at C. Law. 4 Co. 51. Co. L. 162, 6. 351. 2 Bla. 495.

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Unless he reduce them to possession, or exercise unequivocal acts of ownership towards them, which is a constructive reduction of possession, they do not become absolutely his, and upon his decease survive to the wife — But if she dies first and before he has reduced them to possession, they would descend to her representatives were it not for the Stat. of the 29 Car. III. which alters the Com. Law in this particular — This stat. has been adopted in many of the states in the Union Viz. N. York & New Jersey &c, In Con. it has not been adopted and the business stands as at Com. Law — The alteration made by the stat. is, that the choses in action of the wife, not reduced to possession by the husband during coverture, shall still go to the husband as Adm. of the wife's estate, and this statute enabled him after debts paid to convert the remainder to his own use without liability to account —

The wife might appoint an Ex. Still that Ex. was obliged to account to the Husband —

The enacting of the stat. 29 Car. III. is a matter of curiosity and shall be here noticed —

It was law well known among the old Saxons, and universally recognized as such, that at the death of anyone, the personal property was to be devided into three distinct parts, called the rationabili pars Viz. 1/3 to the discharge

Remarks

of debts, 1/3 to the wife, and 1/3 to the children, or representatives. And it was the duty of the King to see that the property was thus arranged and disposed of, but he being unable personally to attend to the business – the duty devolved upon the clergy in each diocese by appointment of the King – The clergy were particularly chosen as being the best qualified to discharge their duty, for in those dark ages of Europe literature was a rare thing, and fell to the lot of but few, except the clergy – and this was the means by which spiritual courts became courts of Probate – This power thus vested in the clergy was shamefully abused, and perverted to the worst of purposes – for in stead of distributing the property as their conscience directed, they appropriated it to what they termed pious uses which phraze (giving it a literally free translation) means the swelling of their coffers or the building of Monasteries for monks and priests to fatten in – This state of affairs existed for a long time, as the influence of the pope was vastly extensive, and as there was no possible power by which the evil could be remedied. The grievance at length became insufferable and a stat. was passed 31, Ed. III. c. 11. 9 R. 26 which compelled the ordinary to grant administration to the next and most lawful friends of the deceased – This stat. placed the business in a point of view less grievous as it gave to the creditors of the dec.

Remarks

It has been holden that tho' the husband neglects to take out letters of administration and an other is appointed still the Adm. is obliged to account to the husband and even if he is representative provided that the husband be deceased, for the remainder of the estate after debts paid — 1 P. Wms. 951. 3 Atk. 626 - - - - -

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deceased against the Adm^rs. for an action against the Adm^rs. for the recovery of their debts — And the Adm^rs. were generally laymen, so that they were unable to review their enquiries under the power and influence of the Papal See; still however they were not compelable to distribute the residum of the estate, there being as yet no statute passed enforcing it. Fortunately however after the Restoration in Eng. the Stat. 22 Charles II. was enacted compelling distribution after debts payed — Now it would seem that this stat. embraced Husband Adm^rs. as well as others, it in fact did — but he or husbands had so long been in the habit of converting the residum of the property her own use to their own use, and as they thought that their pretentions were a little better grounded than those of other administrators, a bill was at length produced, and received the seal of legislative sanction, giving to the Husband the remainder of the property after debts paid —

In Con. this business stands as previous to the making of the stat 22 Charles II. on different grounds, for by statute the administration belongs to the next of kin to the to the wife it is therefore supposed that the husband is not entitled to it "a fortiori" he cannot have her chosen in action as Adm^r. —

Altho' the Husband may reduce his wife's chosen in action to possession, yet he may not bequeath them —

Remarks

P. in Ch. 63. 312.
3 P. W. 199. 2
Vern. Vern. 301.

P. Ch. 203. 4 Vin.
40. Amb. 692.
2 Vin. 64—

1 Bla. 109—

3 T. R. 94. 2
Atk. 208. 420
or 20. 3 P. W.
199.

2 Atk. 208.

1 Ed. 172. Mar
20. 1 Vent. 261.

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It is laid down that a competent settlement made by the Husband to the wife is a purchase of her Choses in action, and he thereby becomes absolutely vested with an absolute right to them, and if he dies before the wife the Choses will go to his representatives —

But the Choses in action of the wife are not liable for the debts of the Husband after his decease, but the debts against his estate be what they may; neither can they be taken in execution, for his debts during his life, — because they are a species of property not liable to be taken on execution — they are not in fact property of themselves, but merely evidences of it —

Altho' the Husband may dispose of the choses in action of the wife at pleasure during their joint lives still he cannot assign them without a consideration, if he does, the contract is not obligatory upon the wife and she may demand them of the assignee — He may release or discharge these Choses gratuitously that is without any consideration —

It is said that the goods of a woman in the hands of another person by finding or bailment, upon her marriage becomes the property of the Husband, and he can sue and recover without joining the wife in the suit, for goods in the hands of the bailee are constructively in the hands of possession of the bailor —

Remarks.

3 T. R. 601—

1 Mod. 179.
~~2 H~~ 2 Mod.—
189. 1 Sid.—
397. 1 Vern.
396. 3 Atk.
20.— — —

Co. Lit. 46. P.
in Ch. 418. 1
Roll 344. 4
T. R. 638. 9
Co. Lit. 351.
1 Com. 654—
1 Roll. 343—

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If the personal chattels of the wife were by a stranger or wrong doer converted, before her marriage, the Husband must join the wife in the action —

Provided the husband is about to sue for a bond of the wifes, he must join her in the action — So that if either of them die after judgment, but before collection, the survivor may be the sole proprietor of it on the principle as Mr. R. supposes of joint tenancy and he farther apprehends that as the doctrine of joint tenancy is unrecognized in Con. should the question arise it would be decided that the Husband should account to the representatives of the wife —

Of the Husbands right to the chattels real of the wife

Chattels real are such personal property as savours of the realty, that is personal property which arises out of or is attached to the realty such as leases &c In the wifes chattels real the husband has a higher or more extensive right than in her choses in action, because he may not only dispose of them with the same freedom as he may the choses in action but they may be taken in execution for the payment of his debts. But if the husband dies without disposing of these chattels real, they will go to the wife, and on the other hand if she

Remarks -

Umb. 692. 3
P. W. 697. Co.
Lit. 300. 351

P. in Ch. 418.
2. Vern. 270.
1 Roll 1347. 34.
1 Com. 555. —
Eq. Ca. Ab. 287.
46. 354. —

Co. Lit 185. 1
Com. 654 —

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dies first they will survive to the husband on the ground of joint tenancy — and from this there will probably arise an important question in the state of law.

The husband cannot dispose of chattels real by will, because the disposition must be made during his life if made by him, and the will does not commence its operation till after his death —

Altho' the husband cannot devise chattels real, yet he may dispose of them by deed, which commences its operation in presenti —

The chattels real of the wife, are not liable for the debts of the husband after his decease, because he could not devise them, and at her death they became absolute in her by the "jus accrescendi", and therefore not his assets —

If two unmarried women are possessed of a chattel real, and one of them marries and dies, her right to the chattel goes not to the husband, but to the surviving cotenant: for by the creation of the estate, she had a right prior to that which the husband derived from his wife, the other cotenant —

Of the right of the Husband to the Real property of the wife.

The husband has a right during coverture to the use-

Remarks

By the stat. 32 ch. 8 the husband is enabled to make leases of the wife's estate for the term of three ~~years~~ lives — which leases are binding upon both Husband and wife — 1 Roll ab. 347. 10 Co. R. 42. 2 Just. 510. 1 Sid. 11 —

2 Bla. 126. Co. Lit. 29. 30 —

Co. Lit. 29. 30

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fruct of all the real estate of his wife, but by Com. Law he cannot alien by any act of his own.

The husband may acquire a greater interest in his wife's real estate, proved he has children born alive which interest is by the curtesy, an estate acquired not by marriage but in consequence of marriage.

If the husband dies first, the wife's real property remains vested in the wife, but the emblements on the land will go to the Husbands Exr.:— So also if the wife should die the emblements ~~would~~ only would go to the husband, unless he ~~was she~~ is entitled to a Curtesy estate.

Tenancy by the Curtesy here explained. On the death of the wife the husband is entitled under certain circumstances to a life estate in her real property, and the fee vests in her heirs, this estate of his is called a Curtesy and he is tenent by the Curtesy. The rule that entitles the husband to this estate is, 1st that he be married 2d Seizen of the wife 3d Issue born alive and 4th death of the wife. That there must have been a marriage to entitle the Husband to this estate, is obvious at the first blush. and the marriage must have been lawful and she (meaning the wife) must have been his wife at her death.

The wife must be seized of an estate of inheritance that is of lands and tenements in fee simple or in fee tail.

Remarks

2 Bla. 127

Co. Lit. 29 b.
Plow. 263. 8
Co. 95 — — —

Co. Lit. 29. 3
P. Wms. 229

Stat. Lon. 250.

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The husband can have no estate by the Curtesy in a re=version or remainder because the wife is not seised or actually possessed of them –

The husband must also have issue by his wife ~~issue~~ born alive ~~who~~ during the life of the mother which issue must be capable of inheriting. the issue must be born during the life of the mother for provided that it should be born a few minits after her death it is evident that the property can=not vest in such child and as it must vest some where immediately it would go to her legal representatives – – –

It will some times happen in estates Tail that the issue will be unable to inherit in fee simple estates it is plain to see this can never happen – Example as to estates Tail – An estate is given to Mary and limited to the females female heirs of her body so that it was an estate in special tail fe=male, John marries Mary and has a son and then Mary dies here John in this case cannot be tenent by the Curtesy as he had no child who could inherit the estate –

By Gavel kind tenures the husband is entitled to the Curtesy whether he has issue or not – In Com. we have no statute regulating the doctrine of Curtesy and of course is as at Com. law and as our property was all held by Gavel kind tenures Mr Reeve supposes that a very great question

Remarks—

The wife may now holds property to her sole and separate use tho' formerly at Com. Law she could not— 2 Atk. 393. 1 Fon. B. 90. 98. 102. 2 Vern. 740. 2. 6 Bro. P. Ca. 106. 3 P. Wms. 337.— 2 Ves. 191. 663—

might have been made and perhaps it is not too late to make it more respecting Curtesy estate on the ground of our property being held by E.K. tenuner, and give the husband a right to the Curtesy whether he had any issue or not —

In Con. it was formerly decided that the Husband should be tenant by the Curtesy only during the minority of the issue, but this is not now noticed or adheared to —

When the wife holds property to her own seperate use the Husband can have no claim to it by the Curtesy —

It will be proper here to remark that a gift made to them sole and seperate use of the wife cannot be defeated by the Husband. If the gift was not to the sole and seperate use of the wife the Husband would have an interest in it and by relinquishing his right or interest might defeat or wholly destroy the gift —

All the choses which the wife acquires during coverture unless given to her sole and seperate use go or directly to the husband or if the gift was immediately to him —

Of the right of the Wife to the property of the Husband.

At the death of the Husband, By the stat. of distribution the wife is entitled absolutely to one third part of the intestate

Remarks.

Plow. 613. 10..
Co. 49. 2 Bac.
140. 2 Bl. Rep.
Lit. Ept. 63.
2. M. 131.

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husbands personal property, and if he dies without issue one half and the remainder to his representatives – This can happen only in cases of intestacy – for the whole of the personal property may be taken a way from the wife by will –

And at the death of the husband the wife has by the Com. Law a more permanent property in the inheritable estate of the husband called Dower which is one third part of the inheritable property which the husband possessed during coverture and ~~if the~~ which the issue if she had had any might by possibility have inherited –

In Com. it is only one third part of the real property of which the husband died seised of, that composes the dower – In Eng. however the wife can bar her dower right to dower by a judicial conveyance that is fine and recovery. And yet a deed executed jointly by husband and wife will not bar the wife of her right, for the act is void –

It has been observed that the Wife is entitled to dower in no estate except to that which her issue by possibility might become heirs – Example, A. marries B. and has a son and then B. dies, and A. marries C. C. shall be endowed of the lands because her issue might by possibility become heirs – –

A wife to be entitled to the estate must be the actual wife of the husband at his decease therefore a de-

Remarks

Co. Lit. 32. 33.
Hoy. 105. Pl. 19
Co. Charles 43.

Hom. 128. Co.
Lit. 33. 40—
2 Bl. 181. Lit.
Ext. 66. Co.
Lit. 30——

Co. Lit. 31. 2
Bla. 130—

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were "a vinculo matrimonii" in Eng. destroys the wife's right to dower altho "a mensa et thoro" because in the last case the bonds of matrimony are not destroyed –

If the marriage takes place before the age of consent arrives, the wife if she is above the age of 9 years will be entitled to dower altho the law considers their marriage not as voidable but absolutely void –

The age of consent in males is fourteen years and in females twelve –

When the parties arrive at the age of consent they may dissent or assent to the marriage – Their dissent operates as a complete dissolution and their assent a complete confirmation of the marriage –

Formerly the wife of an idiot was entitled to dower but the husband of an idiot was not entitled to the curtesy; But it is now established that the wife of an idiot is not entitled to dower because the right of dower grows out of the marriage relations, and this relation is founded on contract an idiot being unable to contract the reason which the right to dower rest is in this case wanting –

The right of the wife to dower is paramount to the claims of Devisees, Creditors and Mortgagees; Because the right of the wife commenced upon the marriage contract and so be-

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-fore that of creditors. If the claims of creditors were prior to the mar-
-riage there being considered by the law as general incumberences and
that of the wife to dower as a specific one, they do not destroy or molest
the wife's right to dower because the law prefers specific incumbe-
-rances to general ones. If the husband purchase lands after marriage
her right "eo instanti" commences and prior to any claims upon it—

A seizen in the husband in law is sufficient to entitle
the wife to her right to dower in the interest. A seizen in law is bar
-ly a right to possess—

The reason why the wife is ~~possessed~~ entitled to dower
in property not reduced to possession, is because the power to re-
-duce to possession is in him, and cannot be exercised by her, &
were the law otherwise he might he might for the purpose of
defrauding her of her dower neglect to possess himself of it—

An alienation evidently in contemplation of death will
not defeat or bar the wife's right of dower; because by law it is con-
-sidered as a testamentary devise or disposition ~~of~~ which cannot pre-
-clude the wife from her dower— in law.

In Con. the wife is entitled to dower in an equity
of redemption provided the husband has an inheritable estate in
the subject matter mortgaged, but the reverse is the case in
Eng—

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Of the doctrine of barring Dower.

There are several ways by which Dower may be barred I will first consider the method of barring it by a Jointure.

A Jointure if intended to be in lieu of Dower must be made previous to marriage, and it must be made directly between the parties who are to be married without the intervention of any third person — it must be made in lieu of her whole dower and not of any part only — and it must be so made as to vest in her that immediately upon the death of the husband it will commence its operation — and it must also be considered expressed to be in lieu of dower otherwise it will not so be considered.

This Jointure must be a competent livelihood otherwise the Court on application will enlarge it. — The principle on which this rests is that the wife when the bargain was made was in an unfit temper of mind to make a judicious bargain — for generally when a contract is made between two persons they must both abide it however foolish it may prove for one of the parties —

In cases where a Jointure is made in lieu of dower after the marriage has taken place the wife may have her election which to take: the Jointure or Dower — If she takes

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the Jointure she will not have the Dower and vice versa.

Of what is a Jointure composed? It must be a freehold property as for example Fee tail or a life estate — because the estate must be of a permanent nature otherwise if it was personal it would vest immediately in the Husband — and also if the estate would probably be of a perishable nature so that before the coverture should be thro' the whole of the Jointure would be dissipated — This business of Jointure was regulated by stat.

By a statute in Con. if the widow does not keep the dower estate in good repair part of the estate shall be taken from her by the County Court to the heirs and given to the heirs with which the repairs shall be made and then the overplus if any shall be paid back to the widow —

Dower will be barred by elopement of the wife with an adulterer — unless the husband should again receive her to favour —

It is likewise barred by a divorce "a vinculo matrimonii" but not by a divorce "a mensa et thoro" —

It is also barred by the commission of treason by the husband — but there is no such law in Con.

In Eng. it is barred by a retention of the title deeds of the husband's lands from the heir to whom it belongs — This operates as a punishment for mahanging the property of the

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heir because the title deeds are the only evidence of their ~~property~~ property in Eng. as they have no public records, this rule does not obtain in Lon.

If the dowager aliens the lands assigned her for dower the "ipso facto" ~~forfeights~~ forfeits her interest therein and the heir can recover it by a suit at law.

It may be barred by levying a fine ~~and~~ or suffering a common recovery.

By a stat. in Com. Dower is not barred by a "divorce a vinculo matrimonii" unless the wife be the offending party.

Of Paraphernalia.

Respecting this subject there are no statutes, the doctrine of Paraphernalia rests upon a long succession of judicial decisions.

Paraphernalia composes certain articles of the ~~wife's property~~ Husbands property which signify some thing over and above her dower. The Eng. law uses it to signify the apparel and ornaments of the wife suitable to her rank and dignity.

Of this species of property there are two classes as

Moor 216.
Co. Lit. 345.
1 Roper 911.
2 Atk. 104.
3 Do. 217.
3 T. R. 393.

3 Atk. 369.
Co. L. on C.
346.

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I. Bedding and necessary cloathing.

II. The jewels and other ornaments.

Of these two branches of paraphernalia the law is materially different. As to the first branch the wife has an absolute claim no one not even her husband can deprive her of her bedding and necessary cloathing.

She may have more than is necessary if so the husband may dispose of more than is notable to her ranks and dignity.

Of the second branch the husband may dispose at pleasure during his life. But by modern authorities he cannot devise them if he should the wife can hold them to the exclusion of the devisee.

Paraphernalia of the second class are assets in the hands of the Exr. or Admr. to pay the debts of the husband after the other personal property is exhausted and not before.

The claim of the wife is superior to her paraphernalia is superior to all other claims upon the personal property, even lessees are to be taken for the payment of debts ~~than~~ sooner than the wife's paraphernalia.

In cases where the specialty creditors have come upon the paraphernalia, the wife in Equity may be deemed a creditor against the heirs, for so much as the specialty creditors have taken from ~~the specialty creditors~~ her paraphernalia.

If all the personal property is exhausted by the sim-

Dower what at common law - cannot be disposed of at ordinary
but conveyance the assignee dower - Co Litt 46 - or less may be barred
the statute under - the wife are alone - is not personal right - if recovered
by fraud - stat of 13 - by Elizabeth could an adult [illegible] voluntary
recovery - stat 27 Hen 8 c 10 - 32 Hen 8 c 36 - conveyance of
jointure or recovery settled 13 Eliz 5 c 18 - 27 Eliz c 4 by
Jointure bars a legal jointure - of a substantial estate for her
own life - company nothing - when engaged - compelled - not
to be worse - as blameing a bond estate assumes - an argument to
settle 3 Br P C 472 does it depend for validity on consent of wife
of it does the Surrogate should consider it - jointure over-reached
fraud - Brook v Brook 3 Br P C 90 - judges divided the reason
Goodtitle Parker de Grey Hill not known - Mansfield Ld Chancellor 4th 430
Hardwicke Eldon Sugden hitherto - perhaps not conclusive
fraud - might not a common law state contrived - the fraud must be
in law of dower - judicial - a deputy guardian the liens of the wife
of the father settled the guardian she has a lien on the lands
settled - a common law that it shall be revocable 3 Ath 430.
for rights to make rights to her or assignee by conclusion
3 Geo 4 Ch 261 4 Br P C 90 Cock 585 - a convert bar
to make rights the defect - longs a fine of his jointure
with the husband dower not barred 1 Eq 339 - settled after
marriage - may the right of the clerks - lands of jointure
lands made before marriage - cannot be affected by the act
of the Husband 10 Jet 37 1 Eq 355 - it cannot be only
not thus - bar by husband to hinder to settle lands
purchased to all under - voluntary settlement to deceive the
a fraud - to wife - the husband devised land to the wife
in lieu of the right of dower 1 Ch 2 310 1 Eq Ca 221

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=ple contract cre[illegible]rs and they then take the paraphernalia of the wife in satisfaction of the remainder of their demands, the wife cannot in this instance have any claim to upon the heir for the para=phernalia thus taken; for the land is not liable for simple con=tract debts.

If the husband create a trust estate in his lands for the payment of his debts the personal fund must first be ex=hausted and then his lands are liable as well for simple con=tract as special once and in case the wifes paraphernalia in case the wifes paraphernalia is taken to satisfy either the simple or specialty contract creditors she has a remedy for the re=covery of the paraphernalia.

The wife has a claim against the devisee for her para=phernalia equal to that against the heir.

If there is a jointure between the husband and wife made before marriage as a discharge of all claims against the estate this is a bar to her claim to her paraphernalia.

If the jointure is made after marriage but in pursuance of an article agreed upon before: it has the same effect.

If the husband pledge during coverture the para=phernalia of the wife for the payment of his debts she and not the ex[illegible] will have the right of redemption.

If at the time of the marriage the parents of the feme make her any valuable present it has been considered to her sole and separate property. 1 Bro. Ch. Ca. 16.

A wife who has separate property may by her own contracts render it liable - but always in such a manner as to render preserve the marital rights of the husband entire - 2 Ver. 190. 2 Ath. 397.

The usual mode of giving separate property to feme covert, has been to grant to third persons as trustees under the idea that a feme covert could not be the direct grantee of distinct & separate property. Mr R. thinks it unnecessary at this time to have recourse to trustees for a great relaxation has taken place in this rule in several particulars - Bumbey. R. 147. 3 Ath. 695. 1 Ver. 298. - There never has been a decision recognising the necessity of trustees in granting a separate estate to the wife 2 Ver. 663 -

The strongest case reported was where a legacy was given to a woman separated or divorced a mensa et thoro and was holden to be the husbands unless it be expressly mentioned in the deed of gift to be to her sole & separate use - 2 Ver. 695. 1 Ba. 264. - All cases in which the wife is considered as a creditor to her husband recognize the right to her separate property - In all cases of settlement of 1 Ath. 399.

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If any personal property remains after the payment of the husband's debts the wife will be entitled to it for the purpose of redeeming her paraphernalia

If the wife suffers the husband to bequeath to her her paraphernalia and she infact takes by device from him she is obliged to abide by the device and provided her husband should have limited ~~it over~~ so the remainder over to an other person on her the death the remainder will go to ~~her~~ such person — for by this step she relinquishes all her original claims to the paraphernalia which she once had —

Mr Reeve thinks that in Conn (provided that the question should be made) the Ecc. would not be allowed to take the paraphernalia of the wife for the payment of debts while there remains either personal or real property for that purpose as in Connecticut both are liable for debts —

Of the wife's separate property —

Of this branch of the subject I shall give but a slight outline at present —

The power which enables the wife to hold separate property to her use has been growing into notice for these two hundred years back — within the last fifty years it has pro-

of her money she has been considered as a creditor to his estate (subsequent however to the claims of other creditors) & when the husband borrowed the fee wife's fair money he was holden a debtor to the wife — 1 Atk. 248. 269.

But all her contributions of her separate property to the maintenance of the family do not render her a creditor to the estate

She sometimes mortgages her real estate in conjunction with her husband & in then considered a creditor to his estate for it's redemption subsequent however to the claims of the other creditors — 2 Vern. 604. 650.

Articles of separation or agreement to separate between husband and wife after husband and wife after the marriage are sanctioned both by law and equity & have an effect to bind the parties & to yield up all the husband's marital rights so far as they extend. a mere agreement to separate will forfeit his marital right to the wife's person — but by this no other marital right will be affected. Burn 542. If he renounces a right to the usufruct of her real estate to her chose in action chattels real & in the articles they will bind him, and she may convey & sue without his joining. the celebrated cause of Compton vs Collinson settles the point.

Co. Lit. 351. Bunbury 209. Ellis v. Atkins 1 P. Wms 834.

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expressed more rapidly than during the whole time before.—

And property by the wife to her separate use is not in the least under the control of the husband.—

The doctrine of the separate property of wife has been established by the intervention of the courts of Chancery for at Com. Law it was but little known and was recognized only in ~~two~~ two cases viz. 1st The power ~~that~~ with which the husband was vested to endow the wife with personal property ad ostiam ecclesiae and 2dly the first class of the wife's paraphernalia was at Com. Law considered as the separate property of the wife and the law is still the same at the present day.

But the practice of the husband's endowing the wife ad ostiam ecclesiae has long since grown into disuse.

In the case of property being given either real or personal to a woman so that it should not go to the husband the courts of chancery have interpleaded and given solely to her.

It was formerly contended by some tho' a decision was never had upon the point that to convey separate property to the wife certain particular words must be used viz "to the sole and separate use" of the wife but it is now well understood that any mode of expression will answer provided that it carries with it the idea that separate property is intended to be conveyed.—

The consequences of these articles are that when the husband gives to the wife a separate main=tenance he will be discharged from all li=bility for her necessaries &c when such main=tenance is generally known — A mere agreement to live separate will not do this and how far the in such a case will be liable will be con=sidered hereafter — There are some cases where labouring people (i.e. when Husb. & wf. labour for their own respective support) where the Husband will not be liable for her necess=saries altho he had made his wife no main=tenance. —

If a married woman living separate shall show a child the legal presumption is that the husband had access to her and of course that it is his unless he shews to the contrary Mr R. pointedly disapproves of this and supposes that the burden of proof should lie on the other side "that he had access to her" —

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And so in cases of property being given to a married woman if any words are used which are indicative of its being intend as her seperate property the husband will have no control over it; as in the case of diamonds being given to a bride on her marriage evening.

The husband may also during the coverture give property to the seperate use of the wife as where he settles that she may have all the avails of the eggs fowls &c which she can raise their agreement will be enforced in Chan.(c)

More of this doctraine will be observed here=after as it will of necessity intwine itself into the subse=quent branches of this Title. "turn back two leaves"

(c) If she lend the money arising from the sale of such things to her husband she will be a creditor to the estate of the amount lent. 3 P Wms 384.

Of the dominion of the Hus. over the Wife.

Mr. Bacon is of opinion that by marriage the Hus=band has gains no more authority over the wife than the wife gains over the husband altho' he is well aware that a difference of opinion has been adhered to.

When ever the wife is guilty of any excess which endan=gers his property or the peace and welfare of the family the husband has an undoubted authority to restrain her but the wife has an certainty the same rights to exercise

121 Ch Ca 176 – by will under the may expect Eqca 215 Ch 1 Ch 4 36
21 Ver 3 Ch 5 Ca 4 Cooke 36 – appropriation of dower – the wife
legacy does not abate 1 Ch Ca 127 – the equitable of devising either to plant
&c – the state of the embowerly & appropriation & use of rent no law Cooke
36 3d Ch 3 Ca 257 1 Ch Ca 230 Cooke 28 Trust 176 Ch Hery
Ch 345 3d Ch 3 Ca 283 the modern cases of mere collat frauds the
disappointing of the mere be done from fraudulent delay the will
The practice of court of probate & admin in lieu of jointure
the embowerly if the angel the many bar jointure Ch 1 Ch 1 Ca
503 2d Ch Ch 13 – Chancellor thing upon 3d Ch 8 – mere judge
does not affect hindrance from can after years may recover –
mortgagee when mortgaged the may redeem – the consequence
of their redemption – attainder of felony & treason either condy
jointure or of mortgaged pur mortgage may have dower or
redeem the consequence of redemption – land devised for life
before marriage devised for years the consequence of dower
not endowed of an equity of observance 2d Ch Ch 252 – wife – gen
not endowed of hunter – the wife of a duke to the pay
her debts & then to bar her the son remained and they before the
debts are paid wife not endowed Eq Ca Ab 4 Husband sons and daughters
& wife endowed she has the endowments – if to her son
would have them the endowment law as to wife death the
endowment on death of widow the alienation of 3d
land dower is confirmed or condemned case of the surfeit of the
husband the single before widow the then widow
cannot be endowed of the dower so good through then
has remained sight – of marriage wife barred dower
for disagreement and enjoy then as a divorce or been sent 5 Ch 1 Ca
Ch 620 Cooke 320 – of the wife of a man inhabiter
marriage being endowed the dower Ch 3 Ch 5
151 – the wife of the wife endowed & the wife endowed dr
Co Ch 31 4th Rep 121

Baron and Feme.

authority over the husband to restrain any excess of his.—

Formerly when the husband had been correcting the wife the old Com. Law allowed the plea of "moderate correction" to be given in justification of his conduct— This Com. law doctrine has been longsince exploded except in the delicate brain of Ch. J. Lewis of the state of Ohio—

If a husband now beats his wife or even violently threatens her she has a right to go before a Justice of the peace and swear the peace against him and the Justice may if he credits the testimony of the wife bind him over to County Court or Quarter Sessions.— The wife is permitted to testify in a case like this because abuse is generally given in secret— "in ovo"

But Kent supposes that their is no doubt but that the case in Hutton 916 is now good law altho the elementary writers have generally thought differently— it is certain that in Strang 633. there is a decision recognising the one in Hutton— which was Lord Reddy's case.—

The Hus. may imprison his wife for destroying his property he may prevent her from going into bad houses & bad company— If imprisoned by Hus. merely because he had the power will be good cause for an application for a Divorce— Strang. 478. 1 Ala. R. 444. 1 Ed 113—

Baron and Feme

Of the husband's liability for the Wife's torts

The Husband in conjunction with the wife is liable for the torts committed by her as well before as during coverture — that is he is liable civiliter — as in cases of slander assault & battery trespass &c. If she should die the action will not survive against him as it would have expired against her had she been a feme sole. If however he should die the action will survive against the wife —

There are cases in which the husband is alone and solely liable for his wife's torts, as where they commit the tort together she is not at all responsible being considered under the coercion coercion of her husband —

That compulsion is no excuse for the commission of a tortious act is a general maxim except where an is made a tortious wrong doer mechanically as a mere instrument in the hands of an other — To this principle the above mentioned rule is a singular exception & in the opinion a foolish and unfounded one —

Baron and Feme.

As to such torts as are confined. Crimes — Here the law considers them as two persons of course they are liable separately for each other acts —

If the crime amounts to no more than base and simple theft & in company with him the doctrine of coercion applies; but if she commits theft alone and without the knowledge of her husband she will be liable alone —

There are one ~~species species of cases~~ class of cases where he is liable alone altho he has no ~~coercion~~ concurr with the wife in doing the act — & this is where she incurs the penalty of a stat — merely mala prohibita. Here the common informer sues as in a civil action of debt as debt by forfeiture 4 Bla. 28 Quere as to this distinction —

Of the power of the Husband & wife to contract together —

It is laid down as a general principle that husband & wife cannot contract together — As to any executory contract in which the husband has promised the wife. Mr. B. knows of no instance in which it can be enforced, for it is certainty a chose in action of the wife & consequently his if reduced to possession & he is holden to have reduced it to possession — This proposition is not true as to executed contracts

The reason given for the rule that the husband cannot convey directly to the wife is that they are considered as one person in law & a man cannot convey to himself. This reason, if it can be called one, is purely artificial. Indeed no rational principle would at all be violated by such direct conveyance —

The stat. of Uses renders but one instrument of writing necessary for this purpose whenever it is adopted — It vests the estate conveyed immediately in the cestuy que use. Now under this stat. a man may convey an estate immediately to his wife altho' nominally to trustees for her use. In this case she is the cestuy que use — Co. Lit. 112. 184.

The effect of marriage on Contracts entered into previous to coverture by the Husband with the wife —

It is generally true that all executory agreements entered into ~~between~~ before marriage which are chose in action, belong of right immediately to the husband —

But altho' in a court of law a wife has no remedy for the husband's non performance of such ag-

Baron and Feme —

= centory agreements yet the chancery have always upheld them, if made solely for the benefit of the wife & in consideration of marriage — 2 Ven. 484. 2 Vent. 343.

So again all bonds entered into before marriage the condition of which is a settlement on the wife have never been remedied at law yet in Equity the bond is good without a of such covenant & will there be enforced — 2 P. Wms. 243 —

Suppose a bond given before marriage and in contemplation of marriage, the condition of which, is that it shall become due on his death — This bond is made by her against her husband's Executor in a court of law unless it be true that the bond was discharged by marriage now this cannot certainly be the case because it would operate to destroy the very root of the provision & because she can enforce it in a court of Chancery and there exists no power of law having her right to recover in a court of Law — H. St. 14. Hob. 216. Co. 9. 54. Cohen. 61. Lutk. 512. 2 Ven. 489.

Question vexata — where a bond is given to a woman before marriage, will it be discharged by marriage? It is settled that in Chancery it will be enforced being considered as an agreement. At law it has been supposed to be void. But neither of the two important decisions have determined it

to be so. In one case Hob. 216. Cro. J. 571. two Judges were of opinion that it was good at law. Hob. Ch. J. was contra. In the other case (1 Salk. 326) Hob. determined it was void against 3 Judges – It is not perfectly settled –

When a husband is bound by the contracts made by the wife during Coverture –

In these cases where the Husband is bound by the contracts of ~~his~~ wife; they are considered as his contracts and he only is sued. The wife is considered merely as his agent.

1. Whenever she contracts under a power of attorney from the husband are as valid to bind him as if he had made them himself this is upon the ground of express agreement

2. Whenever he expressly consents (orally) to ~~his~~ her contracts they will be his upon the same ground of express agreement –

3. A third class includes all cases where he assents to her contracts by some subsequent act or acts.

4. In the fourth set of cases where he expresses no particular consent before or assent after making the contract and yet they are his contracts – As in places where wives accustomarily trade for themselves – As where it is customary for wives to ~~buy~~ buy their dresses &c

Baron and Feme—

Also such contracts as former wives are in the general habit of making one with another as to butter cheese carding &c &c this arises from the locality of custom—

5. Where wives do not generally make contracts the husband may be bound from the particular situation of his family. as where the husband is lame or disabled and the wife has been customarily in the habit of contracting. This arises out of the particular circumstances of the family—

6. He is bound while the articles purchased by the wife are received used in & go to the benefit of the family. Here his assent is presumed—

7. So whenever the contract is for necessaries for the wife herself, which the husband has refused to provide for her— These must actually be necessaries but they must be according to her standing or degree—

A husband may forbid a particular person to trust her & it will be effectual for it may not be as convenient for the husband to pay him as another— This liability of the husband does not proceed on

the ground of agent but upon the ground of Duty & yet the action is indeb. & upon it authorities given to the foregoing rules 1 Mod. 128. 2 Vent. 165. 142. Salk. 118. 2 Shower 283. Str. 647. 796. 875. 1214. Pre. Ch. 502.

B. A husband is bound for money lent to his wife to be laid out in necessaries, & necessaries are actually bought payment is enforced in Chancery & Wt R. see no reason why it should not at law A husband is always to maintain his wife so long as she is with him or if he forces her away —

When a Wife can bind herself by her Contracts —

It will be recollected that the general rule is that the wife's contracts are void, still there are cases where she may be bound. Wt B. will in the first place shew the reason why she ought not generally to be bound, in doing which it will seen in what cases she may be bound. 1st Then it is a principle of the law not to be broken in upon that the husband is entitled to his wife the person of his wife — If she could bind herself

she could be imprisoned which would infringe the marital rights — This principle is on the husband's account — 2d. The law generally supposes her to be in the power and under the coercion of her husband & therefore on her account lest she should injure herself in such constrained circumstances will not suffer her to make contracts She is in fact deprived of the means of paying Now it is evident when neither of the foregoing reasons exist the wife can contract so as to bind herself — As

1st. Where a person having a wife has abjured the realm or expatriated himself — In such case she can bind herself for neither of the reasons exist — The marital right of her person would not be affected, for this he has himself abandoned — neither would she be under his coercion for he is entirely absent —

2d. So where he is banished, the foregoing reasons would not upon the principles mentioned in the last case she can bind herself — Hence we see that it is not merely the coverture absolutely considered which prevents a wife from contracting but the course

=quences resulting from the Coverture*.

3d A more modern case in which she can bind her self is where he is transported for 7 years.

*Co. Lit. 133. Moor. 861. 2 Vern. — belong to the line on the top.

4th The separate case of Baron & Feme & wife altho questioned by some yet in Mr B's opinion settles one important point. The case was the wife of the Baron had married before & by articles of agreement she and her husband had separated he having given her a separate maintenance. During the time of her living separate she made a contract & was afterwards married to the Baron. She is certainly bound by such contract. For the articles to separate gave the husband no possible controul over her either as to her person or her contracts; but on the contrary he thereby relinquished all pretentions to her. No one doubts but what she ought to be bound to the extent of her maintenance. In this case it was decided by Mansfield. Ashhurst Willes & Buller that she was bound to the

Baron and Feme –

extent of her contracts – 1 Burn. 5.

5th When a wife has sole and separate property but lives with the husband can she bind herself by her contracts – Not legally because her person is subjugated would be subject to imprisonment – Chancery however interpeace and will decree a satisfaction for her contracts by a process not effecting her person but her property –
1 Bro. Ch. ca. 16. 2 Atk. 379

6th There is one species of contracts which bind her altho she be with her husband, & have no sole and separate property which forms a solitary exception to all the cases, & this is a conveyance by fine and common recovery in a Court of Justice – she may in this manner convey alone & it will be valid unless the husband dissents; a fortiori it will be valid unless the husband dissents a fortiori it will be valid if he joins her. He may always destroy such conveyance by dissent. In Lon. the same doctrine prevails – 1 Wm. Bl. 334. Co. Lit. 351
1 Root 347. 10 Co. 43.

It is a question never settled in Connect.

whether the wife cannot so convey away her real property that the husband cannot broke it up. Can she not convey an estate so as to commence after his death which would not deprive him of his usufructuary profits? In Eng. she could not because one leading maxim is that an estate of freehold cannot be made to commence in futuro. Neither could she thus limit by way of remainder because it would contravene another maxim that an estate in remainder must be created & commence at the same time of the creation of the particular estate. But in Con.t neither of these maxims prevails therefore Mr R. seems to speak with confidence when he says should the question come up it would be decided in the affirmative

A feme covert has always been considered as capable of exerting a "power". But the act itself is not considered the act of the person is not considered as the act of the person in her act; but the act of the person empowering her

Baron and Feme —

to do it is her act — A feme covert may Execute his, and administer as such, and her wills under a power are as good as any persons —

Any contract which the wife enters into during the coverture except that of fine and recovery is void — therefore if a grant of land is made to her during her coverture, she may after the death of her husband waive it, and generally as before remarked she may waive any contract whether executed or executory —

After the husbands death she may agree to ~~the~~ a contract made during coverture and such agreement or approbation thereof makes the original contract valid without being done over again. As if the husband and wife lease the lands during coverture and after his death she agrees thereto it is binding on her is the original lease without a new one is binding on her we together with all the covenants therein contained and this agreement may be by acts as well as by words or if she receive rent from the lessee after coverture this is sufficient to evince any agreement —

to abide by the original bop -

Some things will now be noticed which have not been mentioned and are managed in the court of Chancery -

It was once a question how far a court of Equity would interfere to compel a husband who had received property with his wife to pay her debts after the coverture was determined but it is now settled that they have no right to interpose because it would be setting the law at defiance — the same rule therefore obtains in equity as at Law. This is mentioned merely because some lawyers have attempted to revive the dispute -

It has been mentioned that the separate property of the wife is liable in equity for her contracts and the judgment is against her property & not against her person, to this purpose 2 Ves. 190

We see thus that a feme covert may have a separate interest from her husband & when she is pursuing her separate property she

may sue by her husband as her prochein ami or next friend or if she refuses she may sue in Ch. alone —

If personal property be given to a feme covert for her sole and separate use she may dispose of it as freely in any mode or manner that she pleases as if she was a feme sole

But why cannot a feme covert convey a way her separate Real property in Eng. By deed she may bind the st of Hen. 8. but I believe that she cannot do it in any manner whatever — But as we have no stat in Conn^t preventing the disposition of real property whether in separate property or not Mr R. sees no reason why she may not dispose in any ~~not any~~ way which she pleases — But in those states where the st of Hen 8 she cannot —

The ~~and~~ notes of the remainder of the subject are lost

punishment falls short of commonly called injury given to the
wife as satisfaction of depriving authorities not recommendable 1 Sk
of Alb 418 7th Burg 461 2 degree Alb 392 421 cases in Alb. Sk
Ld Hardwicke's opinion Equity Lawyers opinion — are unanimously
not second on real property can it be in equity a lien on Some
Lds Bromton 500 can personal property sold on entail tenant a lien

Dr Vag 544 no authority for ~~[illegible]~~
of an estate in the wife, freehold estate by marriage
is an estate for life in the Husband because it may last
for life — he obtains the entire ownership of the estate
an agency to the enjoyment belongs to him of the
inheritance to him Cok 351 has stand stopped the
rent as by being the enjoyment - of Courtesy estate what
Copyhold of a child that could not inherit Husband & wife seized
in right of wife defeasible & defeasible dies & the land descends to
heir Hers the Husbands right to enter is gone the Husband
dies the wife may enter Cok 240 general land lawyer
Husband & tenant by courtesy of a trust estate husband & wife
opinion Dal Sim 203 Dy Sk 3d Sk 223 1 Ch Ca 60 7
3 Ad 157 3 Ad 694 1 Ch Cas 295 - a copy in Palmer 280 ~~[illegible]~~
putting regulations of rent to wife without knowing of
the marriage — Husband & wife tenants to Landlords
authorities contradicting the general principle rent given
to 2 Ch 557 Cr Eliz 61 1 Ch Ca 297 Cro Car 915 Gow 146
Jenkins not necessary in entail estates

Of Husband & Wife

from the lectures of Mr. Gould

Marriage regarded by Com. law and ours as civil
1 Blac. 433 contract. —

Of the rights and duties resulting from the relation of husband & wife,

472 Not one person in law to many purposes. —

I. Of the husbands right to the wifes estate.

The general principle by which the law is to this branch of the subject is regulated is founded on the husbands duty to maintain and protect the wife; and his estate is so for only this as is necessary to enable him to discharge this leading duty. —

1 Of wifes personal chattels in possession —

This in general absolutely vests in the husband by mar-
2 Bl. 435, riage; he may not only dispose of it at pleasure but if he
1 Com. 553, dies intestate before the wife, it goes to his executors or ad =
1 Bac. 259, ministrators.
Co. L. 351 b. He may bequeath it.
1 Com. 553. But he has no right to personal property which wife has in
1 Bac. 259, autre droit — so as executor Bailee &c. &c.
1 Com. 555. Husband also entitled to all personal chattels acquired

1 Bac. 290 by wife during coverture. Ex. Legacy,
Lat. 114, 15.
Cases 127. so also to the avails of her labour. —
1 Bac. 290 2.

2 Of wifes personal property in action, or Choses in actio

Ch. 110.
Str. 216.
3 Wily. 55.
2. Bl. 434.
of this husband may dispose at pleasure - (exception post p.
during their joint lives

But reducing it into possession or some act of ownership
during their joint lives is necessary to give the husband abso=
lute title; otherwise it survives to her on his death, and would
go it is said to her representatives, (Quere? Vide p.) on her own
death, but for the Statutes. 1 Ed. 3d & 29. Ch. 2. —

Ro. Ch. 209.
1 Bl. 515.
2. Bac. 428.
1 Rol. 342.
Moor 352.
3 or 2 Mod. 185.
4 Show. 25

He lose all title in this case as husband but he may
take it as administrator; not liable in England to account to
her representatives - He takes as administrator by virtue of the
above Statutes 1 Ed. 3d & 29. Ch. 2.

2 Bl. 434, 5.

End.

9th Mary is dead Bawn goes as before to George & Edmund & they also take White as before if there is no issue ~~for~~ Brother or sister or any defendant from them or father or mother or grandfather or grandfather the estate must go to defendants of the grandfather and such are George & Edmund

10 George & Edmund are dead without issue but Oliver White the father of Mary was living and Jotham Sleter or the great grandfather & his sons Moses & Aaron & Stephen White & Lucy White the children of Oliver are dead. Bawn goes to Jotham & White Acre goes to Oliver for if there is no issue nor brother or sister or other defendants father or mother or defendants and no grandfather or part of father or other defendants the provided estate descends to the father of the mother of the intestate

11 Jotham is dead Bawn goes to his defendants Moses & Aaron White Acre to Oliver White for the same reasons before mentioned

12th Oliver is dead Bawn goes as in the last case & White Acre to the defendants of Oliver Stephen & Lucy and if Moses had been dead leaving issue such issue would have taken Bawn per stirpes with Aaron and if Aaron had been dead leaving children of my conceit can be correct the children & Moses & Aaron would have taken Bawn per capita if it is incorrect they would take it per stirpes or if Stephen had been dead leaving children these children would have taken White Acre with Lucy per stirpes & if Lucy had been dead the children of Stephen & Lucy would have taken after
could of my construction

is correct if it is not then they take it per stirpes

13 In this case there is no paternal ancestor surviving his mother is ~~also dead~~ living & her children John & Susan Grace & Stephen & Lucy whole has grandfathers children on the mothers side are living – Mary the mother takes both Black & White acre and if Mary had been dead John & Susan would have taken both & if John & Susan had been dead leaving children those children would have taken both per capita if my construction is correct if it is not correct they would have taken both per stirpes and John & Susan had died without issue ~~both~~ Stephen & Lucy would have taken both

14 This case relates to White acre no relative of J can be found but this case Elizabeth is living. Elizabeth will take White acre and if Elizabeth had died leaving an Husband in fee of White acre and without kindred then her husband would have taken White acre

15 Elizabeth was dead. The whole estate shall go to such kindred in the same degree as if she had survived her husband & had died seized that is to say if she had children by a former husband it goes to such children and if she had no issue to her father if he was living and if he was dead to his descendants pursuing the same course as heretofore described

16th case as before only J had two wives Mary & Elizabeth & both were dead the estate shall go in the same manner as in the last case to the kindred of both – Whether the legislature intended that B acre should be distributed as W acre in the 14th 15th 16th is uncertain for the Statute enacts that the estate shall so descend as is pointed out in those cases and as the Statute had

been immediately before proceeding for the descent of inherited
real estate it would be most consistent with a grammatical
construction to confine the provision mentioned in those cases
to a purchased estate; but since there is no provision for
descent of a deferred estate in those cases unless it falls within the
provision of the statute and there is an inconsistency equally
for the descent of property ~~deferred~~ in all possible cases
discovering throughout the statute I apprehend that it is
reasonable to conclude that it was intended to be distributed
in the same manner

17. case as the 4th only 1/8 came by devise from George
Stokes his father's brother & his father Reuben as living

If in this case an estate which came to the intestate by
devise from some kindred is to be considered as a purchased
estate according to the technical meaning of that term it will
go with the 1/8 given to Thomas Rickard & Sally Hollands & sister
of the whole blood; not if it is to be considered as a deferred
estate because derived from some kindred that went to
Reuben the father. If it cannot be treated as a purchased
estate because the words of the statute have made a certain
express provision for all other purchased estate except
that which is derived ~~for~~ from some kindred and it
that it cannot be treated as a deferred estate because
all estate except such as comes to the heir by the death of the
ancestor even that ~~that~~ not that comes by deed of gift or devise can
as much be purchased estate as those which are acquired
by the owner by payment of money then no provision is
made for such estate the idea of the thing must be confined
wholly inadmissible.

18 the same as the 4th only Reuben the father is dead & takes a purchased
estate & goes to Thomas Rickard & ~~Sally~~ Sarah & of a deferred
estate & goes to Thomas Rickard & Sarah and Samuel

It will be observed that the statute that an estate ~~in~~ in tail shall descend in the manner above illustrated as well as fee simple estate ~~any~~ and yet there is a provision in the first section that nothing in this act shall affect any entailment but that the same shall descend as heretofore used. These clauses seem opposed to each other yet I presume the first provides for estates attempted to be entailed after the enacting of the statute.

In many of the statutes of descent in the several states we find a provision for the descent of real property of which the owner was not actually seized in the same manner as of that of which he was seized the statute provides only for that estate of which he died seized the term is doubtless used in its technical sense the maxim seisina facit stipitem will have its full effect in Maryland

In the descending line the distribution is the same as under the statute of 1830 respecting personal property. In the descending line there is no person that can in any case take real property except the father who is heir to child where there is no issue of that child living and if the estate came to the child on the point of the mother such estate he cannot inherit either there is no issue father or issue the brothers & sisters of the intestate ~~may~~ and their children may inherit ~~and as long as there are any~~ if the estate came by descent devised or gift from some ancestor to the intestate such the brothers & who can inherit it must be related to the person from whom it came if the intestate acquired it otherwise in such case any brother may inherit no regard is paid to the person being of the half blood it forms no obstacle in any case on 1st The children of Samuel Sly a half brother can inherit to an estate that came to the intestate by descent as well as Thomas Sly a brother of the half blood it is true that in that case John Thomas could not have inherited the such estate but it is not because he is a brother of the half blood but because he is not related to the person from whom it came the children of the brothers & sisters never inherit as most of them but per stirpes they take what their parents would have been if all the brothers and sisters are dead leaving children

all other relatives take inherit according to the common law of England

Parent & Child. - -

The next private relation of which we are to treat is that of Parent and Child, being the immediate consequence of the former. - -

The general rule is that infants i.e. persons under 21 years of age, are not bound by their Contracts, inasmuch as no person can sue and recover on them; Infants always having it in their power to plead their minority, in bar. This non liability however is not viewed in the light of a disability but as a mere privilage; for it is of no consequence as to the Infant whether his contract be a beneficial one or not, as he may forever rescind it; and this privilge proceeds upon the ground of a supposed want of discretion. - - - - - - - - -

The age of Infancy is fixed or rather limitted to the age of 21 years, a period at which full age is attained for almost all purposes, tho doubtless there are many who are capable of contracting long before that time: yet as it is absolutely necessary to have some general rule respecting this subject which shall hold good in all cases the Courts have thought proper to fix the above determinate period. This rule applies to Females as well as males. - - - -

The right or privilge which is allowed infants to rescind, can opperate no farther to defraud, than merely to the breaking up of the Contract, for they cannot, as an eminent ~~jur~~ jurist observes turn their shield for protection and of defence, into an offencive weapon. - - - - - - - - - - - - - -

Remarks

9 Bl. 118.
382.
Salk 44. 625

1 Bl. 491.
Co. Lit. 247.
Hawk. 42.

Com. 222. 3.
Foster 437.

1 Bl. 464.
4 Bc. 22.
Hawk. 1. 2.
Co. Lit. 247.
Foster 70. 72.

Parent & Child.

Of the disabilities of Infants.

An infant or minor is a person under the age of 21 years, a period at which full age is attained for almost all purposes, at which time they are emancipated from the power of their parents. . . . .

Infants are placed under a certain number of disabilities by Law, which however are said to work to their advantage only. . . . . .

Under the age of seven years they are not liable criminaliter for any act or omission whatever. The presumption is, that the infant under this age is "doli incapax", & this presumption is not to be rebutted. . . . .

There is an instance in the books of the pardon of an infant under this age from a crime; from which some have inferred that he was punishable under that age: But they did not recollect that a person accused of the crime of homicide which was the crime for which the infant was pardoned, may be pardoned before conviction & had they, probably this inference could not have been drawn. It is now settled as law that under the age of 7 an infant is incapable of a crime; the rule is the same as to crimes below capital, between 7 and 14 . . . .

It has also been holden that the presumption of his being "doli incapax" throws the onus probandi upon the public from the age of 7 to 10 & ½ only, and that from this time to 14 the burthen of proof rests upon the infant; this distinction however is not supported. The rule therefore stands now undisputed that an infant from the age of

Remarks.....

4 Bl. 22.
1 Wash. 1. 2.

Co Lt. 247.
70. 72.
1 Hale 25, 7.

4 Bl. 22.
1 Hale. 262.
282. or 202.
Gilb. Ten. 364.
Co Lt. 246.

Foster. 70.
Cro. J. 486.

Rol. ab. 729.

Lovel. 158.

1 Com. 235.
5 Co. 25. 29.
3 Bac. 121.
1 Fonb. 76

Earth. 446.
447.

Parent & Child.

yr 14 is prima facie evidence of his being doli incapax & that between these two periods it is the business of the public to rebut this presumption. After the age of 14 the presumption is, that he is doli capax, & the burthen of proving the contrary rests on him. . . . . .

Altho' it is generally law that an infant over the age of 14 is as liable to punishment as an adult yet the rule is not without exceptions. for it is laid down that infancy excuses from punishment common misdemeanors, yet I presume that the exceptions reach only misdemeanors below felonies. . . . . .

When infants are indicted for crimes, judgment shall not go against them on their confessions, but he who is considered as Counsel for them shall put in a better plea & the crime must be proved.

An other privilege tho' called a disability in infants is that their contracts are void or voidable. . . . . .

In England both males and females are of discretion to chuse their Guardians at 14 ~~in males~~ & 12 ~~in females~~. In Connecticut the age of discretion for this purpose is 14 in males & 12 in females.

An infant may even be appointed Ex.r in ventre sa mere but cannot act as such untill he arrives at the age of 17 and in the mean time administration must be granted to some one durante minore aetate. . . . . .

No person can act as Administrator till the age of 21. & some

Remarks

L. Ray. 338.
Salk. 39.

Lovel. 155.

Lev. Ext.
Ib. 36.
2 Bl. 131.
Ido. 468. 463.

Salk. 44.
625. 638.
L.R. 430. 1096.

Parent & Child.

suppose cannot be one till that age. And altho' a person has a right to administration as next of kin, he cannot be apointed till that age.

The reason why an infant cannot be an Administrator at 17 as well as he can be Executor, is that an Adm.r must give bonds to the Court of probate for the faithful execution of his trust, and an infant is not bound by such bonds, but an Ex.r gives no such bond at Common Law there being a special trust reposed in him by the testator. In Connecticut we have a Statute enabling infants to dispose of their personal property at the age of 17 by will from which it is inferred that they may be Executors, for it is a general rule that all persons who can devise such property may be Ex.rs. But we have an other Statute which seems to render the inference, which declares that Executors shall give bonds for the faithful discharge of their trust. Yet the better opinion is that an infant may be an Executor at 17 that is act as one at that age. - - - -

In England, a female infant may be betrothed at the age of 7 & is entitled to dower if her husband lives untill she be 9 years old But when a female infant is thus given in marriage either party may dissent at the age of consent. - - - - - - - - -

Full age is completed on the day preceding the 21st anniversary of a persons life. An infant may be liable civiliter for a non feasance, as where he omits to scour a ditch whereby another's land is overflowed.

Remarks.....

× It will be recollected that the foundation of the action is the fraud not the contract as the rule of damages may be very different in the case of the fraud to from that in the case of the contract —

1 Hawk. 3.
2 Rol. 347.
Dyer. 105. 109.
1 Ford. 81.
9 Liner. 395.
Nov. 129.
3 Bac. 132.

(a) This rule refers to acts whose beginings are ex de=licto not to those ex contractu altho subsequent acts may be tortious after the contract in mode in this case nothing can be looked to but the contract that & nothing else must be the foundation of the suit —

1 Sid. 258.
1 Lev. 169.
Ford. 71.
1 Ral. 778.
913.
905. or 985.

3 Bac. 132.
3 Burr. 1902.

1 Rab. 914
B. N. P. 222.
3 Burr. 1862

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Infants are liable *civiliter* for their torts; so if a madman or an Idiot, for volition is not necessary to render a man liable for torts.

But there seems to be an exception to this rule in the case of slander; for this tort infants are not liable under the age of 17. This rule cannot be law neither will the case in Ray support it, for there the person prosecuted was 17, and the Court held him liable, but did not decide but that he might have been liable at a much earlier period. I am inclined to believe the true rule to be this. That he is liable at the same age as he would be for his ~~crimes~~ crimes malitium being necessary. . . . . .

Infants are not liable for frauds civiliter. The authorities do not support this rule. He is and ought to be liable observer J.R. *civiliter* for fraud and imposition. . . . . .

The above rule is denied by Lord Mansfield, and it is certain that an infant may be indicted for fraud as a common cheat, & also upon the statute for procuring goods by false pretences. . . .

Judge Rowe is clearly of opinion that infants are liable for
x their frauds he says that a fraud in an infant is a tort in him and that he is as much answerable for it, as he is for his torts. . .

(a) It is a general rule that infants are liable civiliter for those acts which are accompanied by actual or implied force, or violence. This was merely arbitrer & therefore ~~can not be~~ ~~overruled~~.

Remarks...

(a) as when a minor hires a horse & injures him — 8. Term 335.
and the action is brot on the tort not on the contract — for this would be nothing but merely changing the form of the action — as in the case of Allen vs Baker tried in Supreme Court of Con. Feb. term 1808 —

12 Vin. 203. b

13 Vin. 536.
2 Eq. ca. ab 489.
9 Mod. 38.
1 Fonb. 70.
1 Br. ch. 358.

1 Ven. Bl. 75.
1 Fonb. 71.

Co Lit. 89.
Lovel 113. 122.
Pre. Ch. 316.
1 Bl. 460. 5.
2 Bl. 497.
2 Vern. 104.

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(a)

An action sounding in tort cannot be sustained against an infant when the cause of action arose ex con. - - - - - - -

It has been said by two English Judges only (Trevor and Parker) that if an infant pretends to be of age in consequence of which he obtains credit, he is bound by his contract under those circumstances and the doctrine seems to be supported by an inference very rationally drawn from an observation of Lord Mansfield & Kenyon. Mr Gould thinks that it may be considered as pretty well settled that infants are not liable for their frauds civiliter on contracts. - - - - -

Nevertheless Courts of Chancery will in some cases bind the minor to his Contracts when entered into by fraud or collusion & this is done on the ground that the Chancellor is the common guardian of all the infants throughout the kingdom, & that a Court of Chancery is a Court of Conscience. - - - - - - - -

When a Contract is strictly void, Courts of Chancery cannot help taking advantage of its want of validity, they have the power when the Contract is merely voidable. - - - - - - -

Infants at different periods of their minority are of sufficient age for different purposes. - - - - - - - - - - - -

In England males of 14 and females of 12 may if proved of discretion dispose of their personal property by Will, & in this respect the probate or rather Ecclesiastical Courts are regulated by the civil Law.

Remarks.

(a) Infants for example will be liable in the following case — By stat. it is made felony without benefit of clergy to fling a pebble stone into a navigable river now if an infant does so fling a stone he will be within the statute because doing the act is made felony which is an offence without benefit of clergy which is an offence & corporally punished at com. law —

Stat Geo. 23.
3 Bacon 181.
Cowell. 465.
Cro. J. 354.
Plow. 364.
1 Ed. 258.
1 Bl. 453.
31.
1 Hale 21, 22.
Cowell 19, 24.
Dano. 501.
3 Bac. 181. 2.
1 Hawk. 147.
Cro. J. 179.
3 Mod. 310.
Plow. 364.
Salk. 275.

(b) Mr G. says that this is not a reason which he does not understand — he supposes that the true reason to be this — The Judges thought the privileges of minors to need to be curtailed by implication —

Mod. 25.
1 Vent. 51
2 Ld 209, 709.

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In Connecticut, Infants may dispose of their personal Estate by Will, at 17 years of age. . . . . .

All infants are considered as servants to their fathers who by law are entitled to whatever property the infants may obtain by their skill and industry. But to property acquired in any other way, as by devise &c. the parents have no claim. . . . . .

Penal Statutes inflicting upon offenders corporeal punishment sometimes include infants under the general terms "all person", & sometimes not. The rule is if the offence which is sometimes made corporeally punishable by Statute, was punishable at Common Law, they are included if otherwise, they are not punishable.(a) . . . .

In the last class of cases, that is, those which are not corporally punishable at Common Law, the Corporeal punishment is (b) said to be collatheral, that is a punishment not incident to the offence at Common Law. The above rule therefore amounts to this where the punishment is collateral, infants are not included. but where it is incident at Common Law they are included, but where and the Common law punishment remains undisturbed. . . . .

Of the Contracts of Infants. . . .

It is generally true that the Contracts of Infants are not binding upon them: yet an adult is bound by his Contract with an

Remarks. . .

3 Nod. 248.
1 Ed. 709.
3 Bac. 140, 1.
1 Shaw. 171.
Cro. C. 562.
302.

1 Poulton. 38.

1 Ed. 129.
1 Lev. 163, 9.
3 Bac. 140, 1.
Co Lit. .
Vent. 203.

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Infant which is contrary to the general rule that Contracts to be binding must be reciprocal. This rule however must be taken with this qualification, that if the infants contracts are void "ab initio" & not merely voidable, the adult is not bound by them. And this qualified rule is the same in Equity as at Law. It seems to be true also, that altho the infant has received the full consideration of the Contract he may still avoid it, & retain the property received. This rule has been somewhat relaxed by a late decision of Lord Thurlow's who held in debitatus assumpsit good to recover back the consideration paid where the infant disaffirms the Contract. . . . . .

The above rule is clearly contrary to justice where the consideration or property received & remaining in the hands of the minor can be identified — for here the infant can be compelled by a Court of Chancery to return it to the adult without injury to his patrimony

Altho it is regularly true that Contracts of Infants are not binding upon them, yet if they are made for necessaries, they are — This rule however Judge Kent considers as much too broad. For it is first laid down that infants are bound by their Contracts for "necessaries" but they are not to be bound at all events for those articles — the term itself has a double signification; or must therefore specify those articles called necessaries they are food, medicine, instruction & cloathing which even for these they are not absolutely liable unless they actually

Remarks...

Palmer 261.
528.
Esp. 162.
1 Ath. 1101.
3 Bac. 132.3.
Forbl. 68.
Burn. 556.
Poph. 151.

Abra. 108.
or 168.
Esp. 164.

3 Bac. 133.
Abra. 68.
Esp. 161.
Forb. 67.
3 Bac. 133.4.
Cro. L. 883.
Leith. 169.
Bl. Rep. 12.35.
2 Ath. 35.

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stand in need of them, for the law will not indulge any unnecessary or foolish extravagance in infants whereby merchants may take advantage of them. What necessaries are for the minor, must be determined by the trior by the particular situation and circumstances of the Infant in life... -

It is indeed laid down in Cro. Eliz. 583. that it belongs to the judges to determin only what articles according to Law come under any of the classes of necessaries, & of the Jury to determin whether those articles were necessary for the immediate use of the minor. - - - - -

An infant husband is bound for the necessaries of his wife, for as he is allowed to contract marriage, it follows that he may subject himself to all the consequences of the marriage contract. Besides he is bound on the principle, that the necessaries of the Wife are the necessaries of the Husband. And it is also laid down that he is liable for the debts of the Wife contracted before marriage. This I apprehend to be only a reasonable consequence of the marriage, for were the rule otherwise, a female debtor by her own act might defeat the just claims of her Creditors. Barnis Notes or Barnaditon 95. But tho' it is regularly true, that an infant may bind himself for contracts for necessaries, yet when he is under the actual government or protection of a master or Guardian or parent, and that government is duly administered, he cannot bind himself by his contracts even for necessaries.

Remarks. . . . .

3 Bac. 133.
Gro. L. 588.
Lath. 169.

Esp. 164 b.
Co Lit 177 a.
3 Bac. 126.
1 Term 40, 12.

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There are three classes of cases where an infant can bind himself only. I. Where he has no parent, guardian or master, & not even then unless it be for necessaries. . . . . .

II. Where he is out of the reach of their government & protection, in this case it is a matter of necessity that he is bound, otherwise infants under such circumstances, never would be benefited, but would be constrained to undergo the mortification of appearing naked in the streets. . . . . .

III. Where this government is not duly administered. Even in this case the infant is not bound by the express terms of the Contract, but by a Contract implied in law, or by an assumpsit upon the ground of valebat. . . . . .

But an infant is not even bound to the extent of the value of the articles unless they were proper for him, & then indeed he can be bound for them no further than they are useful to him. Ex. gr.

If an infant contract to give an exorbitant price for articles, he is only liable for their real value to himself as necessary to his use, which value must be determined by a Jury. . . . . .

In Connecticut, the Statute on this subject, is believed to be only in affirmance of the Common Law tho' this is made a question. . .

An infant cannot bind himself in a penal bond, for necessaries, because a penal bond is not examinable, & therefore the Court cannot

Remarks.

Ibid. 86.
1 Ibid. 324. 382.
4 Ib. 423. 423.
1 Pow. Con. 6.
35.
1 Dum. 138.

1 Wood. 403.
1 Tom. 41.
1 Pow. Con. 6. 36.

111

1 Pow. Con. 36.
1 Tom. 41.
Salth. 69.

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determin whether the bond was given for necessaries or not. . . .

An infant might formerly have bound himself in a single bill for formerly the consideration might be looked into; but now the consideration of a single bill is not examinable an infant therefore cannot be bound thereby. . . . . .

An infant may bind himself by a negotiable note if it be not actually negotiated and for this reason that the consideration may be gone into, but the very moment it is negotiated that moment it ceases to be binding inasmuch as the consideration cannot be enquired into.

In Connecticut we have inadvertantly considered notes for necessaries given by minors whether negotiable or not, as good. But with us, the consideration of notes of hand can no more be enquired into, than bonds in England. — To preserve the law entire therefore, we ought to have considered such Notes as void, or to have relased the rule and suffered the consideration of Notes to be gone. — It is considered of late however that notes of hand tho' they are considerd here as not examinable, yet their consideration when against infants may be examined. . . . .

It is laid down that an infant is not bound by an invitum compulsit for necessaries, the reason that supported this rule was that at Common Law, an "invitum compulsit" was no more examinable than a bond. This reason seemes to have fallen, for the items of the account may now be examined. . . . . .

Remarks

1 Fonb. 72. 3.
Pos. Con. 341.
342.
1 Tom. 41.

1 Fonb. 72.
Cro. El. 920.
290. 303.
B. N. P. 182.
1 Tom. 40.

2 Roa. 1249.
Esp. 90. 175.
176.
Pos. Con. 108.
116.
3 Burr. 1078.
1 Ken. Pl. 462.
Esp. 164.
B. N. P. 115.

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With regard to Bills of Exchange, the law and the reason of it is the same as that of negotiable notes — An inference has however been drawn from a decision of a case in Carthew 160 that infants are not liable for bills of exchange tho' in the hands of the payee, but the decision does not warrant such an inference. - - - - -

Altho an infant is not liable on a penal bond or security, yet it is a question whether he is not liable on the simple original contract. The decision of this question must (I conceive) turn wholly on this point viz, is this penal bond strictly void or voidable only. - - - -

If the bond is void in the technical sense of the word, it does not merge the simple Contract, which stands of course as if the penal bond had never existed. And it is Judge Reeves opinion that the penal bond is absolutely void. - - - - - - - - - - - - - -

A promise to pay the debt after he becomes of full age attaches to, & confirms the original Contract. - - - - - - - - - - - - -

If the bond be merely voidable the simple contract is merged, and a ratification of the Contract when the infant comes of age attaches to the bond and not to the original contract as in the case of a simple bill. - - - - - - - - - - - - - - - - - -

Whether a penal bond is void or voidable, will be considered hereafter — Mr. Reeves is of opinion that the bond is void, but this point is not settled. - - - - - - - - - -

Remarks.

Salk. 279.
687. 389.
5 Mod. 1030.
" 57.
1 P. Wms. 558.

Cro. J. 494.
2 Str. 1083.
Salk. 79.
Ad. ab. 229.
1 Pow. Con. 663.

2 P. Wms. 401.
3 do. 351. 2.
9 Mod. 128.
1 Vern. 295.
P. Wms. 504.
2 Vern. 429.
3 Ath. 626.

P. Wms. 514.
3 Ath. 626.
1 Fonb. 75.

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An infant is not bound for money lent unless it is laid out in necessaries, & there only in Equity in order to bind the infant at law for money lent, the person who advances must himself procure the necessaries. In this case, the infant is bound only for the real value of the necessaries. - - - - - - - - - - - - - -

So also where the infant is bound in Equity for money borrowed and expended for necessaries, the lender is considered as standing in the place of the vendor & has a claim for the value of the necessaries only.

An infant is not bound for articles purchased to enable him to carry on his trade, for there, the law, does not consider a necessaries. But he may bind himself for articles which are necessary to the acquisition of a trade or profession as there are incidents to his education which is necessary. - - - - - - - - - - - - - - -

An infant is bound by a decree in Chancery tho' not to the Extent of an adult — For he has six months allowed him after he becomes of full age to impeach it, for fraud or for mistake or for Error.

An infant Plaintiff, according to Lord Mansfield is as much bound by a decree in Chancery, as an adult, ~~unless his prochein any has been guilty of fraud or negligence~~ but this rule must be considered with the qualification of Hardwicke's (viz) that he is bound as fully as an adult unless his prochein any has been guilty of fraud or negligence. - - - - - - - - - - -

Remarks.

Co Litt 174.2.
215.a.
3 Burr. 1801.
9 Co. 85.
1 Bl. 575.

2 Atra. 690.
692.
Vent. 203.

1 Term. 468.
Esp. 164.

3 Bac. 132.

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Wherever an infant does an act which he would be compelled to do in Chancery, it is well done & he cannot rescind it, he is bound thereby both in Equity and at Law. . . . . .

For these Contracts which are for necessaries the infant is bound at Law and in no other case is he. . . . . .

The acts of an infant are binding, where he acts in autre droit, as by the authority of some other person as in the case of an infant Officer or Executor if these acts are done in pursuance of that authority; because such acts do not affect the infants interest. . . .

These contracts of an infant which are voidable only, may be ratified by him when he becomes of full age & and they will bind him.

Where an adult is sued upon a Contract entered into when an infant, & pleads infancy, & the Plff. replies a subsequent promise when of full age, and sufficiently substantiates his replication proving a promise subsequent to the original Contract, the onus probandi lies on the Defendant, to shew that he was not of full age when the subsequent promise was made, The reason is because the Deft's age is in his own mind. . . . . .

Of the void & voidable Contracts of Infants.

All those Contracts of infants which are not binding, are either void or voidable, but of late Courts have been more inclined to declare

Remarks

Pow Con. 32.

Pow Con. 32.

1. Fond. 74.
3 Burr. 1806.
1 Mod. 25.

7 Burr. 1804.
Perk. 12 n

them voidable, but of late, Courts have been more inclined to declare them voidable only. To determine when the Contract of an infant is void & when voidable only, is extremely difficult. But Judge Reeve lays it down as a general rule that where an infant cannot enjoy the full benefit of his privilege without having the Contract void, it shall be so considered. But on the Contrary wherever he can, it shall be esteemed only as voidable; for an infant can forever rescind. It has been said that the Contracts of infants respecting real property are void & those strictly concerning personal property are voidable only. — This chiefly regards sales & is no general rule — It may however be laid down says Mr Gould as a general rule, that their contracts are voidable only concerning both real and personal property. The criterion by this rule, by which we are to determin whether a Contract is void or voidable only is the nominal or constructive delivery of the thing about which the Contract is made, or the want of such delivery; If there is such a delivery the Contract is voidable only, if not, it is strictly void. This rule is also applicable to sales, and is denied by Mr. Powell merely because it was established by Lord Mansfield. . . . . .

Agreeable to this rule, a feoffment made by an infant is voidable only. Also in a conveyance of a term, the delivery of the lease is constructively a delivery of tenement tho' there be no actual possession or delivery.

An infant's power of Attorney to convey a right to another is absolutely void 1 Vol. 242.

Remarks.

1 W Bl. 357.8.
1 Mod. 25.
1 Fonb. 74.
3 Bac. 186.
1 Mod. 25.

1 Rol. 730.
1 Mod. 137.

Salk. 10.
3 Bac. 130.

5 Bac. 337.
3 Ld. 142.
2 Lv. 218.
1 Ven. Bon. 32.

Stra. 938.
3 Bac. 142.
2 Mod. 301.
Carth. 436.
1 Fonb. 74.
2 Ven. 600.4.
608.
Ven 500.510.
5 Ld. 643.
Co. 424.42.44.

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The grantee of a lease of an infant cannot disaffirm the grantor lease, which of course are voidable only. -- Altho a power of Attorney by an infant to deliver a seizen is void, yet a power to accept it, is merely voidable.

In sales of Personal Estate as we have before mentioned, if the Property is delivered, the Contract is voidable, if not delivered void: Thus if an adult contract with an infant for a horse, and the infant delivers the horse, the Contract is merely voidable; but if the horse is not delivered, the Contract is strictly void & the adult if he take the horse, is liable in an action of Trespass.

It is sometimes laid down that leases and grants and surrenders are void; this however is erroneous - - - - - - - - - - -

Contracts which are strictly void may be taken advantage of in any way by persons interested in them. Such Contracts are mere nullities ab initio, and things attempted to be conveyed by them are as liable to the Creditors of the original professor, as tho' no such attempt had been made, but if the contract is voidable, no one except the person in whose favor they are voidable or his representatives may take advantage of the voidable quality; to all others they are as the most valid Contracts. . . .

In case of an usurious Contract therefore, which is strictly void, the original parol contract may be proceaded upon, and a recovery had. And in case of a fraudulent mortgage of Lands a Creditor of the Mortgagor may attach them, even in the hands of the mortgagee, so if an infant sell a horse to an adult & the latter take the horse without his being delivered

Remarks....

3 Nov. 1904.

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the Creditor of the infant may attach the horse in the hands of the adult, because the Contract is strictly void; but if the horse had been delivered the adult would have held him against all persons except the infant in whose favor only the Contract is voidable. . . . .

In case of a conveyance of Lands, which is voidable, none except those privy in blood to the original Contractor, in whose favor the contract was made, can take advantage of its voidable quality. . . .

But in Personal Estate, his legal representatives whether privy by blood or not can take advantage of it. . . . . .

It is said to be a general rule, that where the Contract is such an one that from its nature it is not for, nor has the semblance of benefit for the infant, it is absolutely void, but if either the benefit or the semblance of it appear in the face of the instrument it is voidable only. It seems however from a comparison of the decisions on this point, that this is merely a qualification of the former rule. The rule with this qualification is clearly a governing rule & stands thus. Whenever there is an actual or constructive delivery the contract is voidable only, but where such actual or constructive delivery is wanting, the Contract is void, and notwithstanding the delivery of the thing — if the contract is clearly against the interest of the infant, it is still void on the ground of the second rule without any relation to the former. The true rule of discrimination respecting void & voidable Contracts of

Remarks

1 Rol. 730.
Lilth. 10.
5 Burr 533.

1 Rol. 730.

Co Lit. 2, 3, 8.
1 Rol. 730.
2 Inst. 161.
3 Burr. 1866.
1 W. Bl. 578.
1 Fonb. 74.
1 Mod 239.
4 Vin 292. 4.
3 Bac. 137.

3 Burr. 1794.
Cro. E 502.
3 Mod. 310.

1 Hob. 6. 369.
3 Burr. 1789. 193.
1 W. Bl. 579.
3 Ved. 369.

Parent & Child....

Infants appears to be this. "That all gifts, grants, sales, conveyances and obligations made by infants which do not take effect by manual delivery are absolutely void but those which do, are only voidable"...

A Power of Attorney given by an infant to deliver or accept seizin is only voidable. . . . . .

It is said however that a power of Attorney to give seizin to an infant is voidable only, but that an infants power to give seizen to an adult is strictly void, and also in case an infant purchases, where there is no nominal delivery, the Contract thus made is voidable only, on the ground of the latter part of the rule that the contract is void unless it has the benefit or semblance of benefit to the infant. . . . . .

It is said likewise that a lease made by an infant is void, if there be no reservation of rent; this Mr. Gould thinks to be untrue. But Judge Nuve is of a different opinion, for where the infant cannot receive the full benefit of his privilage, the Contract is utterly void. he observes a fortiori it is void in this case. But where an infant reserves to himself rent, it is otherwise. . . . . .

The case of the Young Lady's hair mentioned in some of the books, may come within the first rule when qualified by the second, but not otherwise, for there was an actually delivery of the hair to the barber, yet it being clearly against the infants interest to have her head shaven her Contract was considered as void notwithstanding the delivery.

Remarks

1 Pow. Con 54.
Cro. E. 920.
1 Rol. 729.
Espin 164.
1 Wms 40.
Co Lit. 172.
1 Tomb. 74.
3 Burr 1805.
1 Tomb. 74

L. R. 315.
Burr. 1805.
5 Co. 119.
Gilb. Ten. 162.
3 Bac. 139.
145.

L. Ray. 315.
3 Burr 1805.
5 Co. 119.
Gilb. Ten. 162.
3 Bac. 139.
145.

1 Ves 303.

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The same reason opperates where a horse was sold and delivered by an infant to a bankrupt, the Contract being considered as absolutely void.

A penal bond is frequently treated of in the books as being absolutely void. But Lord Mansfield is evidently of a contrary opinion, viewing it as voidable only, and it is so laid down in many authorities. . . . . .

But it is said that an obligation is voidable only. A penal bond is an obligation, therefore a penal bond is only voidable . . . . . .

On the supposition, that the general rule extends to this case, the bond is only voidable, for there is a manual delivery of the bond. In considering that rule however we consider in reference solely for sales, tho' it is held by many to extend to other Contracts of infants. . . . . .

The bond also gave a right and not merely a power to give a right, and hence may be considered as being voidable only. And also if an infant wills that all the Contracts to which he has set his hand shall be performed, Chancery will enforce this Will even in the case of a penal bond.

Tho' perhaps it may be said that this may be done on the ground of a legal act designated by the bond. It is agreed by all, that non est factum cannot be plead by an ~~infant~~ infant to his ~~simple contracts~~ bond, and hence it is inferred that it is voidable only, because a feme covert whose bond is strictly void may plead the general issue of non est factum. . . .

If we allow that the general rule applies, then the qualifying rule will not affect the case. Altho an infant may not plead the

Remarks

Pow. 54.
Thel. 729.
Moor. 679.
Hutt 106.
Co. El. 920.

general issue, yet according to the opinion of Lord Hardwick he may plead a special general issue or a special non est factum. — — —

But on the whole it remains doubtful whether the penal bond of an infant is strictly void or voidable, yet the balance of rules and authorities seem to favor the opinion that it is ~~actually~~ strictly void. The authorities however observes the Judge will not support this construction; for in none of these cases did the question call for a decision, whether the bond was void or not, but whether the infant would avoid it by a plea of infancy: I am of opinion that a bond given by an infant is only voidable, for he may set it up by matter ex post facto, as by a promise when of full age — which could not be done if it was absolutely void, it cannot be avoided by a plea of non est factum. and Chancery will decree it paid when he bequeaths his property for the payment of his debts which they could not do, without considering the bond as voidable only, otherwise they would make a contract for the infant, which they are not authorized to do. — —

In Connecticut the penal bond of an infant is on the same footing as the promissory Note of the infant. — — — —

If an Infant gives a warrant of Attorney to confess Judgment against himself, the Court in England will on motion vacate the Judgment — But in Connecticut we have no such beneficial practice, as that of vacating Judgments. However to preserve the principles of law

Remarks.

1 Rol. 728. 731.
B. N. P. 69.
1 Ford. 131. 2.
3 Co. 65.
Co Lit 295. 271.
2 Vent. 203.

Stra. 690.
2 Term. 766.
1 Salk. 354.
Dough. 53.
1 Ven. Con. 33.

Doug. 53.
1 Ven Con. 33.
2 Vent. 203.
Stra. 690.
2 Term. 776.
1 Salk 354.
1 Rol. 731.
Ford. 131. 2.

entire, such judgments ought to be considered as void, so that the infant might have the full benefit of his privilege . . . . . .

In addition to what has already been said of distinguishing void from voidable Contracts it is to be observed that voidable Contracts may become valid by a subsequent assent as in the case of an infants Contracts.

But void Contracts cannot be rendered valid even when the party becomes of full age, and it is a rule of Law that whenever a contract at it's creation is void, it cannot be rendered valid by any subsequent assent, but not so of voidable, for they by assent may become valid. Thus in the case of a purchase or sale of Lands for a term by an infant, the payment of rent after he becomes of full age is a sufficient assent to confirm the Contract; and in this case he is bound not only for the subsequent rent but for the antecedent rent in arrear. . . . . .

The Law is the same where the assent is by his heirs he being dead and any assent is sufficient which widences an intention to confirm the Contract on the part of him by whom it was voidable. Co. Lit. 296. 171. . . . . .

These incidents and characteristics of void and voidable Contracts are important to be remembered as they will enable us to determine what contracts which may arise, are void. If upon the examination of the books we find that a similar contract has been rendered valid

Remarks

1 Mod. 25.
137.
1 Vent. 51.
1 Pos. Con 38.
1 Ch. 1.
Stra. 937.

Pow. Con 39.

by a subsequent assent, we may conclude that such contract is strictly void. If we find that any person can take advantage of its want of validity it is void, but when no one can except the person in whose favor it is or his representatives it is voidable only.

It seemes to be a general rule that executory contracts of infants are voidable only. This rule tho' not expressly laid down in the books is plainly deducible from a comparison of decisions in the cases of Notes of hand and parol promises against infants, And clearly executory contracts do not in any conceivable case violate the privilege of infancy, as they merely convey a right of action.

A penal bond seemes to be an executory contract for it merely possesses a right of action, not in possession. Yet from its analogy to grants and deeds it is laid down as a Contract executed.

A surrender in law and an acceptance of a new lease according to the second rule is void, or voidable, according to the terms of it. If it increases the term of the infant or decreases his rent, it is voidable only, but if neither of these, it is void.

When the voidable Contracts of Infants may be ratified or avoided...

There is some contradiction in the books relative to the time in which the voidable Contracts of infants may be avoided..

Remarks

1 Bl. 579.
3 Burr. 1808.

Co Lit. 247.
248. 380.

1 Term. 161.

1 Atk. 487. g.

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If an infant levy a fine or suffer a common recovery or enter into any other security or recognizance he must avoid them during his infancy or it cannot be done. The reason assigned for it is that his nonage by which they are to be avoided, is to be had by inspection, which it is said cannot be done after his full age this rule is considered as a great hardship towards infants. . . . . .

A feoffment it is said can be avoided by the infant during infancy but this is not true: for where a voidable Contract is avoided by an infant it is a mere nullity and not a consideration for a futer Contract. So that according to this rule, a feoffment avoided by an infant ~~this~~ could not be confirmed by him when an adult — And yet it is certain that tho' the infant intended to avoid the feoffment during his minority, he may still confirm it when he comes of age . . . . . .

So also in Connecticut in case of a leafe and release the infant tho' he attempted to avoid it during his minority, may ratify it, when he comes of full age, which is a decisive proof that his attempt was ineffectual.

The same rule obtains with respect to a leafe: this rule is denied by Coke, but his doctrine on this subject is proved to be wholly untenable.

The infant when of full age may ratify a Contract made by some other person in his behalf either by an express or an implied assent. — If an infant ~~execute~~ a power of Atty to confess a Judgment, the judgment & Execution issuing upon such judgment are void. . . . .

Remarks . . .

21 Vin 336.
336.
Hard. 276.

1 Pow Con 42.
44.

1 Bro. Ch. 132.
3 Ath. 56.

Fonb. 68.

5 Brev. P. Ca.
570. 270.
1 Ver 53. 54.
Eq. ca ab. 101.
102. or 187.

1 Ver. 55.
3 Ath. 613.
Burn 117.
Pow. Con 54.
1. Pow Con. 45.
9 Mod. 101
2 P. Wms 574.
3 Ath. 608.

Parent & Child. . . .

But in Con.t the practice is, to stay proceedings by an injunction. . .

There seems to be no rule laid down in the books determining when those Contracts of infants which are voidable, & which respect personal property may be avoided. I conclude however from the transitory nature of property that they may be avoided at any time during infancy. . . . . .

Equity cases exempt.

There are many cases in which an infant is bound by his contracts in Equity, tho not at Law. . . . . .

If an infant enter into a marriage settlement agreement, he is bound by it, such an agreement being subordinate to the Contract of marriage. — Whether a male infant can bind his real estate by a marriage settlement agreement, is said as yet to be unsettled. . . . . .

Whether he can bind his Estate of inheritance is likewise unsettled; but it has been decided that he cannot bind his estate for life. . . . .

That a female infant can bind her portion or bar her dower by accepting a settlement of personal estate in the room of a jointure seems not to be disputed. . . . . .

So also it has been holden that a wife is bound by accepting a bond for the livelihood in lieu of her dower. And it is said to make no difference in case the portion of the wife is in personal property, whether it be in actual possession or depending on some contingency. . .

Remarks.

1 Va. 502.

2 P.W. 243.

3 Ath. 612. 13.

1 Bro. Ch. 110. 116.

3 Ath. 56.
3 Bro. P. Ca.
5 [illegible]4. 514.
1 Ferb 70.

1 Ferb. 74.
2 Bro. Ch. Ca.
513, 543.

Bro. Ch. Ca.
115, 116, 152.
2 P. Wms. 244.
3 Ath. 613.
1 Pro Con 47.
50.

1 Pro Con 59.
Stra 604.
2 Ch. ca 211.
Eq. Ca. ab.
282.

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So it has been holden in Chancery that where there was no express agreement, the husband was entitled to the wife's portion in consequence of a Settlement. . . . . .

It is laid down by Lord Mansfield that if a feme infant attempts to convey an estate of which she is seized in fee in consequence of a marriage settlement, such agreement will be enforced by Chancery. This rule however has not been adopted in its full extent by subsequent Chancellors; Lord Mansfield is of opinion that she would not be bound in this case unless the settlement was adequate to the Estate agreed to be conveyed but that she must have issue by him. And Dr. Hardwick thinks that she must also avail herself by taking possession of her settlement. This opinion has however been questioned. . . . . .

These agreements of feme Infants in order to be binding must be entered into before marriage . . . . . .

If a male infant marry a female adult it is clear that he is bound by her Contracts to convey her Real Estate . . . . . .

An agreement in consequence of marriage in order to be binding in Chancery must be reasonable, and the time in which such agreements are reasonable is pretty accurately drawn by Courts of Chancery. . .

A male infant as was before observed, cannot bind his Estate of inheritance, but his lease with consent of guardian he can. . . .

If an infant capable of disposing of his personal property by

Remarks

3 Bac. 146.

3 Atk. 700.
714. 15.
Prec. Con. 43.
47. 48.
1 Ves. 298.
Co. Lit. 52.
Pow. Powers.
43. 48.
Powell on Pow.
42.
1 Ves. 306.
Powell on Pow
433.

1 Ves. 203.
1 Vern. 203.
Pow. Ap. 54.

1 P. W. 229.
Ina. 604.

Will, make a bequest of his personal Estate for the payment of his debts Chancery will compell the Executors to discharge them

This rule has been confined to infants of the age of 17 but it extends to those of any age who are capable of disposing of their personal property by Will . . . . . .

How far infants are capable of exercising a power.

An infant cannot exercise a general power over real Estate; but he can a special one, such being not discretionary.

It seems however that he cannot execute a power over his own inheritance as in this he is intrusted . . . . . .

It is said by Lord Hardwick that there is no precedent of a valid power executed by an infant, but this is not true to the extent asserted.

It may be laid down as a general rule that where the power is discretionary an infant cannot execute it, but where it is special the line of execution is marked out & not discretionary, he may execute it. Altho an infant be interested in the subject matter about which the power is to opperate, yet he may execute it if it be of personal property and he be of sufficient age to make a will . . . . . .

But tho it is generally true that an infant cannot execute a power over his inheritance he may make a jointure to his wife from an Estate for life . . . . . .

Remarks

1 Hawk. 79. 80.
P. W. 245.
2 Str. v. 275.
1 Hawk. 121.

1 P. W. 42. 486.

Tam. 432.
3 Mod. 9.
1 Lev. 135.
1 Br. Ch. 386.
2 P. W. 28.
Cath. 309.

2 P. W. 446.
2 Ath. 177.
3 Bac. 290.

2 Fon. 223.

2 Vent. 760.
2 Ath. 117.
Pr. Ch. 50

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Infants in ventre sa mere...

Infants unborn or in ventre sa mere are in law for many purposes in esse - - - - - - - - - - - - - - - - - - -

The killing of such child tho not murder is a high misdemeanor yet if a child in that situation be so injured or wounded as to die after its birth in consequence of that wound or injury, the perpetrator is guilty of murder. An infant in ventre sa mere may inherit an Estate.

Such an infant may take by devise, but when a devise is made to an unborn child, the Estate devised goes untill its birth to the heir at Law, and on its birth the heir is divested & the Estate vests in the devisee. So he may take under a term for raising portions for the children living at the death of the parent. - - - - - - - - -

So also on the death of the Father, such child is entitled to a distributory share of the personal Estate under the Statute of distributions. If the distribution is made upon the faith that there is but one child, when in fact there is an other "intra" after its birth the distribution will be revoked. - - - - - - - -

So he may take under a term for raising portions for the children living at the death of the parents - - - -

An infant in ventre sa mere may have an injunction in its favor against any one who is committing waste upon

Remarks.

1 Bl. 430. 462.

1 Fu. 240.
3 Bl. 124.

Salk. 228.
9 Mod. 607.
Earth. 309.
1 Sid 150.
1 Lev. 38.

4 Bac. 312.
2 do. 169.

5 Com. 50.

1 Ver. Lo 99.

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his inheritance, on application of his guardian or prochein amy he may also have a testamentory guardian appointed under the Statute of Charles 2nd. - - - - - - - - - - - - - - - - - -

It was formerly holden that a devise to an infant in ventre sa mere could not be granted directly but must vest in some other person till its birth. This opinion however is exploded and the devise may be made in direct terms to such infants. - - - - - - - -

A devise in these terms viz "I devise to my unborn Child, whenever it is born shall be good. - - - - - - - - - - - - - - - - -

It was enacted by Statute 10 & 11 Wm & Mary that infants unborn with respect to limitations should be the same as to infants born.— In Connecticut an infant in ventre sa mere may take by deed; for here a freehold may be made to commence in future In England where the oldest son inherits the ancestors estate, the ancestor dies leaving only daughters to take the estate but if there be a son in ventre sa mere, they are divested on his birth and the Estate will vest in him. - - - - - - - - - - - - - - - -

If the owner of a fee, make a feoffment stipulating that if his heirs will pay a certain sum it shall revest, it is said that if the Daughters pay this sum they will hold this Estate tho' a posthumous son is afterwards born. - - - - - - - - - - - - - - - -

But this rule holds only I conceive, in cases where the Estate

Remarks.

L. Ray. 163.
Moor. 177. 637.
Cro. El. 423.
Salk. 231.
Ba. Ch. 50.
Sha. 192.
1 Sid. 153.
1 Lev. 135.

Moor. 637.
Carth. 309.

Cro. C. 36.
Cro. C. 267.
3 Buc. 725.

5 Co. 27.

11 Co. 4.
Cro. C. 279.
556.
2 Rol. 151.
4 Mod. 279.

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would not otherwise be redeemed within the time limited for its redemption. — Personal property of the ancestor who died has been allowed by the Statute of distributions to the infant in ventre sa mere.

So such posthumous Child may take a legacy upon the same principle.

A devise of real property to a child in ventre sa mere is now settled in Fearne on Remainder to be good, the law being the same as to real & personal property. Fearne 429. . . . . .

Contingent remainders may be given to persons in ventre sa mere for in this case, the Estate is given to A remainder over to B. so B. may be in esse before A's death. . . . . .

Of Infants incapacity to hold Offices.

In England, infants may regularly hold ministerial Offices, but not judicial ones. . . . . .

It seems from some of the Books that an infant may be a Mayor, for they say the acts of an infant mayor are binding, This instance is subordinate to a former rule, so that it is good only where an office is ministerial and not judicial. — An infant at seventeen years of age may be an Executor. . . . . .

A ministerial Office in England may be granted in remainder to an infant and when it devolves on him & he is unable to execute it himself he may appoint a deputy for that purpose, but a judicial one cannot

Remarks.....

3 Bac. 126.
note

3 Bac. 126.

Co. El. 336.
3 Bac. 372.
4 dt. 36, 8.
Co. Lit. 36.

2 Term 129.
3 Mod. 122.
Plow. 264.
2 Inst. 28.

Co. Lit. 246.a
3 Bac. 192.
129.
1 Vent. 199.
2 Ven. 233.
234.
Carth. 49.

1 Vent. 199.
2 Ven. 233.
234.
2 Vent. 336.

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be granted in remainder, for such office cannot be executed by Deputy.

An Infant it is said cannot hold the Office of Attorney because say they an oath is necessary, and an infant is not adequate to accept it.

Neither can he be a juror for here also an oath is necessary, and the office of a juror is a judicial one. - - - - - - - - - - - - - - -

An infant cannot be bailiff, factor or receiver, because he is not liable in an action of account. - - - - - - - - - - - - - - -

It seems to be a general rule that an infant can hold no office which cannot be exercised by Deputy. & ministerial, generally can be - - - -

In England, an infant may be Goaler and like other Goalers is liable to Creditors in case of an escape - - - - - - - - - - - - - -

It is indeed unsettled whether an infant can hold any Office in Connecticut for it is not customary to appoint them to Offices. On the principles of the English Law it seems they can hold none, except that of Executor & whether even that is questionable. - - - - - -

How far Conditions are binding on Infants...

An infant is not bound by a condition when the breach of it, would subject him to a penalty, (distinct from the forfeiture of the Estate) called a collatteral penalty. - - - - - - - - - - - - - - - -

But altho' infants are not bound by conditions, when a breach of them subjects them to a penalty distinct from a forfeiture of the Estate held upon

Remarks.

2 Vent. 560.
Co. Lit. 246
~~Cro. C. 556.~~

8 Co. 446.
Co. Lit 236
Cro. C. 556.

8 Co. 446.
1 Rol. 851.
Co. Lit 283. b

Plowd 364.
Co. Lit 54 a
Fonb. 82.
2 Ins. 382.
8 Co. 44.

1 Lev. 31.
3 Bac. 515.

condition yet where a breach of the condition subjects them to a forfeiture of the Estate only, they are bound. To this rule however, there is are exceptions. All conditions fall under two general heads first conditions expressed & secondly Conditions implied. . . . . .

Express conditions need no discription, for being express, they discribe themselves. It is a general rule that infants are bound by them unless a breach or non performance subjects them to a collateral penalty.

This condition is generally annexed only to the tenure by which offices are holden and by this, infants are bound. . . . . .

The second kind includes all common law conditions; not founded on skill and confidence. — And on this condition all Estates are holden a condition by which infants are not bound. . . . . .

Conditions implied by Statute are also of two kinds; the first are those where the Statute on a breach or non performance of the Condition on which the Estate was holden, gives a recovery of the Estate. The 2nd kind are those where the Statute gives not a recovery against the person holding on condition for non performance or breach thereof, but only a right of entry. By the first kind infants are bound: by the 2nd they are not.

In what cases the Statute of limitations runs agt. Infants.

According to the current of authorities the Statute of limitations runs against infants as well as adults in all cases when they are not

Remarks.

1 Eq. ca. 304.
Fee. Ch. 519.

3 P.W. 309.
or 364.

Pafh. 104.
1 Vent. 251.
Salk. 408.

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expressly excempted from the opperation of it. - - - - - -

The infants right to compel a trespasser to account as trustee in Chancery for the profits of the Estate is bound by the Stat. of limitations.

It is laid down as a general rule if an infants Executor, administrator or trustee, do not sue for the infant within the time allowed by the Statute of limitations the infant is bound, This rule I apprehend, applies to those cases where if the infant had no Executor &c he would not be bound, that is, to those cases where infants are excempted from the operation of these Statutes. - - - - - - - - - -

The rule amounts to this: if there be a person duly qualified to sue for the infant, the infant is bound, tho there be a provision in favor of infants.

Legacies according to the English Law are payable in one year from the testators death, if there is no time specified for the payment of them; & if in favor of infants will draw interest from that time tho there is no demand made. But a legatee who is an adult must make a demand of the payment of the legacy before interest will begin to accumulate. - - - - - - - - - - - - - -

When an Infant may sue by Prochein amy....

When an infant brings a suit he must appear by his Guardian or prochein amy, for he cannot appear by Attorney, he not being of a capacity to make a power of Attorney. - - - - - - - -

Remarks.

3 Bac. 149.
Cro. J. 640.
Bulst. 24.
Palm. 295.
Roll. Rep. 257.
Hutt. 92.
F. N. B. 27.
Style 369.
Dyer 56. 104.

1 Rol. 288.
Vent. 185.
2 Ro. 878.
3 Bac. 150.

Barnes. 28.
3 Bac. 666. 680.
1 Eq. ca. 721.
Tom. 491.
Gilb. Ev. 87.

Cro. E. 99.
2 Rol. 299.
Mitford. 26.
2 Eq. ca. ab. 299.
1 Ven. 122. 89.
Atk. 709. 1217.

L. Ray. 232.
Atk. 709. 304.

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A prochein amy is any person who will undertake an infant's cause.

At common Law when an infant was plaintiff he could appear by his Guardian only; but by Statute he is enabled to appear by his prochein amy, which extends to four classes of cases. - - - - - -

I. Where he is estranged from his Guardian.

II. Where his Guardian will not permit his name to be used but assents to the institution of the action, in which case the dissent of the Guardian could have prevented the commencement of the action by any one. - - - - - - - - - - - - - - - - - -

III. Where the infant brings the action against the Guardian.

IV. Where he has no Guardian. The reasons of this Stat. are adopted in Connec.

If an action is brought by the Husband and Wife, she being an infant both may appear by an Attorney, But when actions are brought agt them, she must appear by her Guardian. - - - - - - - - - -

When an infant sues by Guardian or next friend, the one by whom he sues, is liable for the cost, for which he must give security. - -

In this case it has been said that the Guardian or prochein amy and infant are both liable. But this doctrine is denied, & it seems now to be settled that the infant is not liable Stra. 708. In the last authority it is considered as settled. - - - - - - - - - -

When a Guardian or prochein amy appears for an infant the Court must enter an allowance, that is, they must enter upon record that the

Remarks

Kirby 410.

Pre. Ch. 376.
2 Ver. 452.

Dyer. 104.
Star 127.
Cro. C. 22. 240.

Cro. J. 640.
Palm. 225. 50.
Co. Lit 131.
Hutt. 92.
Rub. 266.

1 Sid. 424.
Burr. —

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Guardian or prochein amy was allowed to appear. . . . . .

But in Connecticut it has been holden that a tacit consent of the Court that the Guardian or prochein amy may appear for the infant is a sufficient admission. . . . . .

It is laid down that any one as next friend may bring a bill for an infant, tho' without his consent, but the Court in the case, must see the infant's rights preserved, and inquire into the qualification and character of the person bringing the bill. . . . . .

Altho' an infant when Plaintiff is not liable for Costs yet when Defendant, he is liable for Costs as an Adult. . . . . .

An infant when sued must always appear by his Guardian, & never by his prochein amy: This rule remains the same as at common Law, the Statute having allowed those cases only where the infant is Pltff.

If an infant when sued has no Guardian, the Court must appoint one ad litem. This Guardian in England, this Guardian in England, is usually some Officer of the Court, who is supposed to be capable of supporting the infant's rights: ~~And in Connecticut this infant's rights~~. And in Connecticut the infant's Atty is usually appointed by the Court. —— By appearing by Guardian or prochein amy, he must resign his plea. It is regularly true that where there is a Guardian in being, a Court cannot appoint one ad litem, yet to this rule there are exceptions in two cases 1st. Where the infant is estranged from the Guardian & 2d. Where the Guardian has demanded himself.

Remarks

Cro. J. 289.
Ghol. 77.
2 Bac. 198.
220.
3 Term 435.

4 Burr. 58.
1 Ba. 189. 308.
4 Burr. 2022.
560.

Kirby. 116.

Kirby. 116.

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When an infant is sued it is customary to summon the Guardian in a clause of the writ, but tho the Guardian is not thus summoned this circumstance is in no cause of abatement because the Court may stay proceedings & order him to be summoned . . . . . .

If an infant is sued with an adult he appearing by an Atty and entire damages are given, the whole judgment is erroneous. But if the different parts of the judgment which are erroneous, are severed from those which are not, those only which are reversed are erroneous . . . . . .

It is a point however frequently in dispute whether such parts of a Judgment are in particular severable . . . . . .

In the State (Connecticut) it has been holden that if the entire damages are given in a case like the one supposed, the judgment is erroneous as to the infant only . . . . . .

If in England a fine is levied against an adult, and an infant it will stand good against the adult & erroneous as against the infant.

When a Judgment is erroneous as to both only it may be reversed as to them; and stand good as to the debt or damages . . . . . .

Illegitimacy....

A legitimate child is one born during lawful wedlock or within a competent time after its determination . . . . . .

Remarks

Co. Lit. 102.
222.
Co. J. 341.
1 Bl. 480.

Co. Lit. 242.
2 Stra. 940.
Esp. 483.
L. Ray.
Salk. 123.
2 Stra. 925.
1076.
Esp. 482.
L. Ray. 395.
1 Bac. 310.
Salk. 122
483.
1 Rol. 368.
1 Bac. 310.
1 Rol. 539.
Co. Lit. 244

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But it is not to be understood that every person born within lawful wedlock or a competent time afterwards legitimate. Such a birth is only prima facie evidence of legitimacy, a presumption, like all others, liable to be rebutted. . . — — — — —

An illegitimate child is one not only begotten but born out of Lawful wedlock. This definition tho' laid down by Blackstone is yet plainly deficient; for a child may be both begotten and born out of Lawful wedlock and yet be legitimate. Thus, the child may be begotten and the parents afterwards intermarry, & the Father die before the birth of the Child, This child would doubtless be legitimate tho' begotten and born out of Lawful Wedlock. A more complete definition is "an illegitimate is one begotten out of, and not within wedlock or within a competent time after the determination of marriage". — — — — — — — —

A child born agreeable to the definition of legitimation is only presumptive evidence of legitimacy; but formerly this presumption could not be rebutted only by impossibility of access on the part of the husband or incapacity on his part. And in those times by Common Law, nothing short of the husband's being beyond the Seas during the whole time of gestation was considered as proof of impossibility of access - And impotency was provable by the husband's want of age only. The age in which impotency ceases is not settled

Remarks...

Co. Lit. 244a.

2 Rol 785.
Salk. 122.
484.

3 Ch. 175.
5 Mod. 419.
Stra. 925.
Esp. 434.
3 Wils. 274.

2 Stra. 940.
Esp. 493.

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in the Books, some say at 8, others at 14. - - - - - - - -

So it appears that if the husband has been beyond the 4 years - even 40 years, yet if he returned before the birth of the Child it would be legitimate. The law was the same if the husband had been over so long beyond the 4 Years if on his return he should marry and on the 2nd day after his wife should be delivered of a child; Because on enquiry it was said, would open a door to such a disagreeable retrospection that the law will not permit in any case. - - - - - - - - - -

The rule "that impossibility of access could be proved only by the fact of the Husbands being beyond the four Seas." And "that impotency for want of age, in time gave way to a more easy mode of proof: after this change any facts which in the minds of a jury proved an impossability of access were deemed sufficient. - - - - - - - - - - -

And the habit of a mans body, as a defect in the organ of generation was admitted as a sufficient proof of impotency. - - - -

Still it continued a rule that if there was any possibility of access and generation on the part of the husband, the child was considered as legitimate; tho the want of either might be more clearly shewn than in any of the former periods of which we have been speaking. At length it became established that other proof than that of physical impossibility of access, or generation might be admitted to rebut the presumption of legitimacy:

Remarks.

1 Term. 356.
Esp. 484

1 Bl. 435.
Cowl. 225.
or 35.
1 Rol. 357, 360.
7 Co. 42.

Salk. 122.
1 Rol. 349.
7 Co. 42.

4 Term. 350.
Stra. . . 25.
Esp. 482.

B.N.P. 112.
Esp. 482.

4 Bl. 443.
1 Rol. 625.

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As in the case of a Wife who lived with an adulterer bore his name & was reputed to be his. such being the facts, this Child was held as legitimate notwithstanding that the husband lived within the kingdom.....

In Connecticut we have no such mode of proof, that the husband must be extra quatuor mare. It is now settled that if a marriage is void from the begining; the issue of such marriage is illegitimate. ...

By divorce a vinculo matrimonii the issue of that marriage if within the Levitical degrees either by affinity or corporeal imbecility, are bastardized. - In Connecticut such marriges are void ab initio; & therefore the issue are bastards. In England, pre contract was formerly a good ground for a total divorce, but this law is abrogated.....

A Child born during divorce a mensa et thoro is presumptively illegitimate; tho' this presumption may be rebutted.....

But after a voluntary seperation the presumption is that the child is legitimate, yet this presumption is rebutable.....

The wife is not an admissable witness to prove that there was no access, but she is to the want of continancy.....

Subsequent marriage according to the civil and cannon Law legitimate, the Children born before the marriage but this rule does not obtain in Eng.d or Con.t - A divorce a vinculo matrimonii can only be obtained during the lives of the parties, for such divorces are granted for the purpose of seperating the Offenders pro salute animarum, and not for the purpose of bastardizing the issue.

Remarks....

Palm. 9.
1 Rol. 356.
1 Bac. 312.

1 Bac. 312.

B.N.P. 114.
E.N.P. 485

Co Lit. 8.

1 Rol. 357.
1 Bac. 312.
Co Lit. 8.

Parent & Child.

When a Child is legitimate tho born out of lawful wedlock.

Within what time a child born after wedlock is prima facie from evidence of the legitimacy; or how long a time must elapse from the dissolution of the marriage to render the infant prima facie legitimate is a point about which the books differ but they say generally 9 mo. & 10 days.

But whatever be the usual time if the Child is born by or before that time it is presumptively legitimate, for there is no doubt but that circumstances may either lengthen or shorten the period of gestation and it is usual in such cases, to have the opinion of Physicians on the subject: It has been decided that when the period was 9 months and 20 days, the Child was legitimate. These cases were decided upon their own peculiar and special circumstances. . . . . .

But when the question arose when the child was born 11. months after the death of the husband, it was decided in the negative. . . . .

If a wife on the death of her first husband immediately marries and have a child at such a period of time that according to the usual course of generation he may belong to either husband, it has been a question to which he shall belong, but it is now settled that the child may have his election. . . . . .

It has been decided that a Child born 9 months and 10 days after the death of the husband may elect but this opinion was upon the ground that 9 months & 10 days was the usual time of gestation.

Remarks

Co. Ld. 123.

1 Bl. 457.

1 Bac. 312.
1 Rol. 357.

Com. 891.

Parent & Child....

But if the rule be true, that a Child born 9 months and 10 days after the death of the first husband belongs to him; it is also true that one born 9 months & 11 days after the death of the first husband belongs to the second husband, & one in 9 months & 9 days to the first.–

There seems to be no proper precise time fixed at which a child may be born after the death of the husband, in order to be prima facie legitimate for the usual time of gestation remains unsettled. It is however lately believed to be 9 months. . . . . .

To prevent any doubt as to the rightful father of a Child, the Common Law forbade the marriage of a widow untill the expiration of one year from the death of the husband – their year consisted only of nine months. The same rule obtained in England under the Saxon & Danish governments, whose year consisted of 12. months. — According to the prevent common law, the heir of a person may have a suit "de ventre inspiciendo" to examin whether the Widow be with child or not, and if she be found pregnant he may keep her under due restraint till delivery. In Gothic times she might be hurried off to a Castle and there be confined and examined..

The rule that Parents shall bastardize their issue extends to one instance only (viz) Children born before marriage, for either parent may attest to the birth of a Child before marriage and the wife may testify to her own incontinence of access on the part of the Husband. . . .

Remarks...

Com. 191.

1 Bl. 1185
1 Bl. C. 1185.
1 Ro. 194.
3 Co. 8 a. ✗
Co Lit.
1 Com. 583.
3 Do. 61
Cro. El. 510.

Cro. El. 510.

Moor. 10.

Co Lit. 3 b.
6 Co. 65.

Parent & Child....

So also a Wife's declaration in an answer in Chancery concerning the illegitimacy of the Child may after her death be given in Court as testimony. . . . . .

In Connecticut, Mr. Reeve presumes that the declarations & answers of the husband would be admitted. Thought to be remarked that these rules relative to bastardizing children do not extend to those who are dead. . . . . .

Of the rights & capacities of Bastards...

Those rights of an illegitimate Child says Judge Blackstone, are but very few, being such only as he can acquire, for he inherits nothing being looked upon as the Child of nobody; yet he may acquire a name by reputation, and by this he may take by purchase, tho' a term of time is necessary to acquire a name by reputation . . . . . .

An illegitimate child it is said, cannot take under the discription of his Fathers issue. But this rule wants some qualifications: he cannot indeed take under the discription of his Fathers being issue . . . . . .

It is laid down in Moore that an illegitimate child may take under the discription of "a Child" when the words of the instrument or Will are "all my children &c" This rule however is particularly questionable when there are legitimate Children. . . . . .

It has already been observed that an illegitimate child may take by

Remarks

2 Rol. 43. 4.
1 Sid. 184. 144.

Co. Dl. 510, 11.
1 D. Wms. 529.
2 Rol. 43. 4.
Co. Lit. 3 b.
1 Bl. 170.

Noy. 33.
Co. Lit. 3 b.

1 Bl. 484.

Cof. 486.
Salk. 120.
3 Lev. 410.

Parent & Child....

name of reputation: so also having acquired the reputation of being one's child, he may take under the description of child or issue. . . .

It is laid down that a limitation to the unborn illegitimate child of a man is not good, for it is said that the law will not intend, the birth of an illegitimate child & therefore the event is too remote. . . .

Besides it is urged that to suffer such a limitation to take effect, would be countenancing an illicit correspondance between the sexes, which is contrary to the policy of Society. . . . . .

But on the other hand it is said that a limitation to the first born child of a woman is good, tho' that child be a bastard, for here the child is certain as soon as born – as a bastard immediately on his birth acquires the reputation of being his mother's child, yet here the reason assigned against the former rule viz that to allow such limitations to take effect is contrary to the policy of society, applies with as much force as in the former case. . . . . .

An illegitimate person cannot be heir to any person, neither can he have heirs but of his own body. . . . . .

The rule that a person can be bastardized after his death holds true in one case only, & seems to be rather an exception, than a rule.

The case wherein an illegitimate child may be bastardized after his death is that of a bastard eigne. . . . . .

When a man begets a bastard & after its birth marries its mother

Remarks...

7 Co. 44.
Jenk. 268.
Co Lit. 33a.
245.

Co Lit. 244.
1 Bac. 316.

Salk. 121.
427.

1 Bl. 485.

Parent & Child....

And by her has a 2nd child, the bastard is in Norman french called bastard eigne, & the legitimate child mulier puisne ....

When there is a bastard eigne & a mulier puisne if on the death of the Father, the former enters upon the Estate and enjoys it uninterruptedly till his own death it shall descend to his issue to the total exclusion of the mulier puisne & his heirs of whatever discription for in this case it seems that a bastard shall not be bastardized after his death. But this case must be taken strictly, the bastard eigne must have had undisturbed possession till his death, he must have had issue in esse and not in ventre sa mere only, otherwise the legitimate child would not be excluded from his fathers estate .....

The settlement of a bastard in England is the place of its birth, unless fraud has been practiced by one parish upon another by imposing the Children, in which case, the child's settlement shall be in the parish of its mother .....

But in the State of Connecticut the settlement of the mother is the settlement of the Child, by the adjudication of our superior Court ...

Of the Mothers & putative Father's liability for the support of their bastard children and the mode of enforcing that support....

The mother and putative father according to the statute are equally liable for the support of their illegitimate children ....

Remaks. - - -

5 Tom 273.

1 Bl. 484.

Parent & Child.....

The oath of a mother is admitted to prove a man the father of a bastard child and this oath may be before or after the birth in order to render him liable to the support of such a child...

The Mothers oath is prima facie evidence that the person charged is the Father; But this presumption arising from the evidence may be rebutted or over ballanced by more weighty proof; yet it has been found it is said in only three instances in Connecticut. Altho this rule may seem hard upon the person charged, yet there the necessity of the case, there being rarely any other proof it is said ought to be law.....

Altho the object of this suit is wholly civil, yet the form is criminal; so also is the form of the judgment, which obliges the Father to find security for the damages awarded, and if required to save the town harmless (to which the mother belongs in case of fraud practised) in which the child was born. But neither of the securities were required of the Mother.....

It is holden that whatever a mother has sworn before her death will be sufficient to charge the Farther with the support of the child after her death. This is agreeable to the general rule of evidence..

If the Woman marry or die before delivery or miscarry or prove not to be with child the person charged is of course discharged....

It is settled that the Mother of a bastard child is compellable to testify to the Father

Remarks...

1 Bl. 486.

1 Bl. 480.
Stat. 49.
39 & 40.
Eliz..

Parent & Child....

tho' not within a month after its birth . . . . . .

It is a settled rule in trials of this kind that depositions may be admitted in evidence notwithstanding the ~~case~~ trials partake of a criminal nature & notwithstanding the rule that depositions may be admitted only in civil suits. . . . . .

Of the reciprocal duty of maintenance between Parent and Child....

Parents if of sufficient ability are bound to support such of their poor impotent children as are unable to support themselves and on the other hand children of sufficient ability are liable for the support of their Parents in all those cases where they are unable to support themselves. . . . . .

Whether a Grand Parent or Grand child is liable for the support of the other, is a questionable point, altho it would seem clear from the Statute that neither is liable for the maintenance of the other: yet a contrary opinion is entertained by some, Mr. Reeve is of opinion ~~is entertained~~ they would be liable . . . . . .

If persons who are liable to this duty neglect it, they incur a penalty of 20/ monthly a sum which may sometimes be sufficient for the paupers support and sometimes not. The regulation therefore appears to be defective. — When there is more than one person liable the proportion of maintenance will be equal according to their respective abilities to support. . . . .

Remarks...

P. Ray. 1454.
L. Tem. 119.

Parent & Child....

It is a rule that the man who marries a woman having children is not liable for their support even tho' the mother was herself able and therefore liable at the time of the intermarriage to support them. &c. . . .

The reasons assigned for this rule are, that the Statute commands no one to support another where the Law of nature commands no one to support anothers children . . . . . .

This rule is wrong I apprehend on this ground, the husband takes his wife cum onere, so that he is liable in all those cases only, where she was liable at the time of marriage. Had she not have been competant to the support of her children, then I suppose he would not have been liable to the support of them. — But it is clear that a man is not liable for the support of the parents or Grand Parents of the Wife. This rule is said to be taken out of domestic policy, but seems to be opposed to the Idea that the husband is to bear the burden of his wife, as the latter at the time of marriage was liable for the support of her parents (and according to the opinion of some) Grand Parents. — . . . . . .

If a pauper has both Parents and Children it is questionable which shall support him, whether the parents or children, or whether all who are of sufficient ability shall contribute each a proportionable share to his support; On a slight glance of the question, it would seem that each should contribute a share proportionable to his ability; but on a nearer view, it will appear. I conceive that the children ought to be

Remarks.

Parent & Child...

solely liable. On the one hand, the children according to the common course of things are becoming more and more able, and on the other, the parents are becoming less and less able to discharge the duty of maintenance.

The children owe their existence and support in infancy to their parents i.e. to the persons who are now helpless, and are bound in their turn to administer to his wants. I however do not know that there has been any decision on the question.....

Of the Parents duty to protect his Child...

A parent is not only bound to maintain but also to protect his children; & this duty the law rather permits than enjoins; the dictates of nature rendering any legal provision on the subject as unnecessary...

It is a question as old as the year books, and one which doubtless originated from this duty, that a man may justify a battery in defence of his child and the child in defence of his father. But neither can justify a battery under a pretence of defending the other unless it is actually necessary for the defence of the latter. A vindictive battery is never justifiable. The true import of the rule, is, that a father may justify a battery in defence of his child, in those cases & in those only in which the child might himself justify it, and vice versa.....

And such indulgence does the law shew to the workings of parental affection that where a mans son was beaten by another boy and the

Remarks.--

Bl. Rep. 892.
1 Sub. 81

Parent & Child....

Father went near a mile to find him & then revenged his sons quarrel by beating the other boy of which beating he afterwards died; he was holden guilty of manslaughter only. . . . . .

The Parent may maintain & uphold his children in their law-suits; and vice versa without being guilty of the legal crime of maintenance.

Of the Parents liability for the Torts of the Child....

A parent is liable for the torts of his child in the same cases that a master is liable ~~not~~ for those of his servants and is ~~not~~ liable not as parent, but as Master, for a minor is the Servant of his Parent. . . . . .

It is a general rule that if a child while in the business of the parent do an injury which arises directly from an act necessary to the performance of the business, the parent, and sometimes the child is liable. But if the injury does not arise directly out of performance, the child only is liable

Thus if a child be employed by his Parent in driving a Team; and while driving according to the parents direction's runs over an infant and injures him, the parent is liable. But if the Child instead of driving the team according to the parents directions should leave it, and go to a neighbouring field & beat another boy the parent would not be liable. . . . . .

And it appears to be a general rule, that in cases where human prudence could not provide against the accident which caused the injury neither the parent nor the Child is liable. . . . . .

Remarks...

Parent & Child . . .

Of the Parents liability for the Contracts of his Child. . . .

It has been already remarked that the Parent is bound by the Contracts of his Child for necessaries; and for these he is bound as parent, it being the duty of a Parent to provide necessaries for his child . . . . . .

But there are four classes of cases in which he is bound, not as parent but as Master, for the Contracts of his child . . . . . .

These are first where the child is expressly empowered by his parent to contract; 2 Where he has a general license to Contract; 3 Where the articles purchased come to the parents use, a use in which the parent by applying the articles to his own use or use of his Family, is said to give an implied subsequent assent to the Contract, and 4th. Where the Child has a general license to trade for himself. . . . .

There is however one case not yet mentioned which seems to be an exempt one, whereon the parent is bound by the Contract of his child as parent. Who that Contract be not entered into for necessaries. If the parent has occasionally ratified and discharged the contracts of his child, not made for necessaries, nor in the Character of servant to his parents, he will in future be bound by Contracts, provided the ratification or discharge implied an approbation of them any such approbation will generally be presumed, unless the Contracts are Contra bonos mores: — In all cases where the parent is liable for the torts of the child, he is not considered in law as the immediate wrong doer or party to the torts. But when an action is brought on the Contract, the declaration declares upon the contract without ever mentioning the Child . . . . .

Remarks...

L. Ray 259.

Parent & Child

Of the Parents duty to educate his Child. - - -

A parent is not only bound to maintain and protect; but also to educate his children in these particulars consists the principal duties of Parents to their Children. - - - - - - - - - - - - -

It is laid down that Parents are bound to give their Children an Education suitable to their situation in life. But the Law has made no provision to enforce this duty, except one by which overseers of the poor and two Justices are enabled to bind out the children of poor parents till they are 21 years of age & another which prohibits parents sending their Children abroad to educate them in the Popish religion. - - - - -

Of an Infants capacity to acquire Property. - - - -

An infant is as much entitled as an adult to all the property which he acquires in any way whatever except by his services and he can acquire property in any other way as tho he were an adult. But the Parent is entitled to the services of the infant and cannot even give him his earnings so as to defeat the claims of those who were Creditors antecedent to the Gift. - - - - - - - - - - - - - - - - -

Of the Parents right of Action for an injury to his Child. - - -

A parent may have an action for an injury done to his Child provided the injury in its consequences be injurious to himself; but for an injury to the Child which causes him neither loss of service, nor expence, nor disgrace

Remarks.

1 Term. 166.
Esp. 164. 654.
2 Vent. 353.
L. R. 1032.
Th. R. 259.
3 Will. 59.

2 Term 168.

4 Will. 19.
Esp. 645.

Bacr. 1873.

Parent & Child.

of himself or his Family, he can have no action.

The parent when his child is injured in order to recover for a consequential injury to himself, must state his damages specially and prove them on trial, which if he does, he will recover as master to his child. — The action for an injury sustained by the parent in consequence of an injury done to the Child has been vi et armis but it clearly ought to be an action on the case for the injury sustained by the parent is merely the consequence of the tort committed upon the infant.

The parent also is entitled to an action per quod servitium amisit against a person who has debauched his daughter, begotten her with child In this action, loss of service is the principal ground or gist of the action The expence and inconveniance of her sickness are however allowed to aggravate the damages, tho these I apprehend would not constitute a good foundation for a distinct and separate action.

Where the action for the injury of trespass is vi et armis, the nominal ground is the illegal entry of the Defendant on to the land or into the house of the Plaintiff as the case may be.

When the action is case loss of service is the only ground of damages The incidental expence, the disgrace of the parents family, her situation and character and his conduct are each an aggravation, And this is a rule with the Court as well as with the Jury.

It is laid down that an action on the case for loss of service will not lie

Remarks.....

P. Bay. 1032.
2 Jan. 168.

2 Jan. 168.
1 Jan. 168.

Parent & Child.

unless the parent some way prove the child to be his servant.

But where it is necessary to prove her to be his servant, the slightest evidence is sufficient, as that she milked his Cow &c.

If a Daughter be a minor she is of course his servant, unless she lives from home, and has no wages, or having wages is allowed to appropriate them to her own use or purposes, and therefore the rule that the daughter must be proved to be the servant of her parents, seems to apply only in the case of an adult.

It is a question which has not lately been decided, and which may perhaps now be considered as unsettled, whether a parent can maintain an action for the expence at which he has been put in consequence of the injury done to his Child where there is no loss of service or where there is a loss and he omits to state it in his declaration. However it was once holden by two Judges against one, that he might maintain such an action, I should have no doubt that this decision settled the question, were it not frequently laid down that there must be a loss of service to entitle the parent to an action. But this rule I apprehend, originated from an other which is, that there must be a pecuniary or temporal loss without a loss of service: Also it became in time to be inaccurately stated that there must be a loss of service which therefore probably amounts to no more in meaning than there must be a temporal loss; and how it is presumed that the action will be

Remarks.

Parent & Child. . . .

where the Daughter is a minor or where she is an adult and unable to maintain herself. . . . . .

It is said by Espinasse that the daughter must be a minor and also that she must reside with her parents in order to entitle him to maintain his action but neither of these positions are true. . . . . .

It is a settled rule that in this action the Daughter is a legal witness for her Parent. — This action also lies as for the real parent, for any one standing in loco parentis. . . . . .

When there is an illegal entry or invasion of the parents house or lands the action may be vi et armis that is the gist of the action and proof of that fact and that alone will entitle him to a verdict in his favor notwithstanding he fail to prove the consequent expence and loss of service circumstances which go greatly to aggravate the damages; But if he fail to prove such illegal entry, he will not support his declaration, tho' he prove ever so much expence and loss of service and therefore the action will fail. When there is no such illegal entry, an action on the case is the proper one — It is the opinion of Judge Reeve that the debauchery and consequent disgrace & infamy of a child is sufficient ground for the Parent to found an action upon.

The damages in this case are regulated by the character and reputation of the female. — The parent may also have an action per quod servitium amisit against any one who entices away his child. . .

But it is perhaps unsettled whether he may have an action, when there

Remarks.

1 Hawk. 130.
122.

1 Hawk. 121.
122.

1 Hawk. 73.
37. 130.

Parent & Child. . . .

is no loss of service, tho there is little doubt if a question should arise, that it would be decided in the affirmative. - - - - - - - - - -

Of the Parents right of correction. . . .

A parent has a right to correct his child reasonably and the right is founded upon Parental duties, for to enable him to discharge those duties it is necessary that he have a controul over his child. - - - - - - - - -

This right continues no longer in the parent no longer than till the Child obtains the age of 21. But the roman Law was much more rigorous: according to that the the parent through life had the power of life and death over his Children. - -

But if the Parent exercises that right unreasonably and with a vendictive mind, the child has a right of action against him, which he may commence by his prochein amy yet the Parent is not liable for every excess. - - - - - - - -

If he mistake relative to the conduct of the child or carry to excess unintentionally his punishment, the parent is not liable, for the right is merely discretionary, and therefore there must be both malice and unreasonablenes to render the parent liable. Malice however in its legal sense, is not as in its vulgar signification acting with an ill will to any peticular person but acting malo animo from improper motives. Altho the malice in the case be not express yet the Jury may imply it from the unreasonablenes or manner of correction; as from a beating with a stick &c. If a parent in correcting his child is not obviously unreasonable & kill him he is only guilty of homicide by misadventure, but if the correction be obviously unreasonable he is guilty of manslaughter at least, as the case may be murder. - - - - - -

Guardian & Ward.

A Guardian is defined to be, a temporary parent; a person standing for the time "in loco parentis". At Com. Law it is said that the office of tutor & curator of the Roman laws, unite in the person of the Guardian. But this is not universally true; sometimes at Com. Law and always by the Roman laws, the two offices are kept distinct 1 Mc. 187.—

The several species of Guardians.—

Guardian by Nature, in Chivaldry, in Socage, for nurture, testamentary Guardians, Guardians by special custom, by election of the infant, by the appointment of the Chancellor, and litem.

I Of Guardians in Chivaldry.

Guardians in Chivaldry obtain only when the ward had an estate vested in him by descent and holden by the tenure of night service.— If therefore the descent ~~by~~ ~~broken~~ were broken by feoffment or by any other means; the lord of whom the fee was holden lost his guardianship he being

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the person who would be otherwise entitled to it.

His guardianship ceased if the ward were a male, at the age of 21. If a female, at the age of 16, or on her marriage, and the superior was intitled to no guardianship over a female if she were of the age of 14 at the death of the ancestor of whom she was to inherit the estate.

A Guardian in Chivalry was not accountable to the ward for the rents and profits of his estate; his only duty was to maintain the ward.

As this was a Guardianship arising from a particular tenure, the guardian was intitled to a particular power, in consequence of the wardship, only over the person of the ward & such of the ward's lands as lay within his seignory.

This Guardianship was transferable from one to another — for it was not a matter of trust or confidence, but merely a privilege or incident of the feudal system, a system of slavery which prevailed over all parts of Europe, after the decline of the Roman empire and particularly after the Norman conquest. But this with many other slavish appendages were done away by stat. Ch. 2, 12 at the restoration.

Co. Litt. 88. b. note 12.

3 Com. 415. 6 Co. 22 - b

3 Co. 36. - b. ——

3 Co. 38 - b.

Co. Litt 88 b - 89 a.

Co. Litt 88. note

Earth. 386 -

3 Co 38. 5 Mod. 229.

Co. Litt. 88. notes 11. 12.

3 Com. 114 —

Guardian & Ward.

II. Guardians by Nature.

Some books speak of this kind of guardianship as tho' it belonged exclusively to the father; and others as tho' it were confined to the father & Mother; but the truth is, that it extends to any of the infants ancestors. And where there are two ancestors of equal degree and equally entitled that one who first gains possession of the infants person shall be Guardian.—

This guardianship extends only to heirs apparent, therefore younger brothers and bastards are not entitled to it and it is doubtful whether a daughter in case there is no son, is intitled to it, she being not heir apparent but presumptive only.

This species of Guardian extends only to the person. It may be suspended by the appointment of a testamentary guardian, by the Father, and ends when the infant attains the age of 21.

When an infant is subject to this kind of Guardianship & that in Chivalry, the former gives place to the latter, unless the father is the natural Guardian, in which case the custody of the ward's person

Co. Litt. 88b. note.
p. 12. Doe Ath. 984.

Co. Litt. 87. b. 88 note 13.
2 Mod. 176 ——

Guardian & Ward

will still fall to the Guardian by nature.

It may happen, that a guardianship by nature and in socage, may meet in the same person; if so, the Guardian in socage shall have the custody of the wards person. That is the person on whom both guardianships devolve shall be considered as guardian in socage and as such have power over the infants person so that he will be accountable for the "valor maritagii".

By Stat. 12. Ch. 2. "The father may be Guardian of all his children till they attain the age of 21. & his power extends to both, their persons and estates — He is called Guardian by nature in the Stat. but he is not so according to the import of the terms of the Com. Law; the stat. means only that, he is pointed out as the Guardian of his children by the law of nature & the same is meant when as is frequently done, he is styled guardian by nature in Chancery.

III. Guardians in Socage

Guardian in socage arises from socage tenure; and obtains only where an infant under the age of 14 has, by descent, lands or tenements holden by socage tenure

Co. Lit 87.

Co. Lit 87. 88.

Co. Lit 88. note 13.

Cro. J. 98. Pl. Com.
415. 2 Jo. Wms 192.
2 Roll. 684 n 5 —

Co. Lit. 88. note 13.

Co. Lit. 88. note 13.

1 Roll 40. Co. Lit.
89. note 13 ——

Guardian & Ward –

The Guardian must be next of kin who is competent and who cannot by possibility inherit the estate –

When there are two persons in the same degree, he who first obtains possession of the infant's person shall be Guardian –

But the rule has two exceptions; first where there are two or more half sisters – Second where the infant has lineal ancestors, males in equal degree with females, the males shall be preferred –

A Guardian in socage may exercise a higher power over the ward's estate than the Guardian in chivalry; for he may keep it till the ward arrives at the age of 14.

It may happen that there shall be no person of kin to the infant, (who may not by possibility inherit his estate) In this case it would seem there could be no Guardianship in socage –

If one intitled to Guardianship in socage be himself a ward, his guardian is intitled to the custody of both –

The power of the Guardian in socage extends not only to the person of the ward & his estate holden in socage tenure but also to any other lands

Plow. 2 93.

Co. Lit 90.

Co. Lit. 89. note

13. 2 Bac. 687.

2 Mod. 177.

1 P. Wms. 403.

Guardian & Ward

or tenements tho' it be copyhold; ~~provided~~ provided there is not a special custom of the manor to appoint a guardian for them, & some thinks that this power extends even to the ward's personalty —

This Guardianship cannot be assigned, transferred or transmitted it being a personal trust —

Guardianship in Socage continues only to the age of 14 years —

The Guardian is allowed his reasonable expences; and on the other hand is ~~allowed~~ accountable for the rents and profits of the lands & estate of the ward, yet he cannot be sued till the ward arrives to the age of 14.

A Guardian in socage may be superseded by the fathers appointing a testamentary guardian —

Those who claim this species of Guardianship claim it under the Com. Law as a right and a thing of course.

Courts of Ch. have taken it upon them to remedy the evils arising from this, & now they will compell the Guardian to give bonds and account annually; or even displace him. This power was not given by any statute; but wholly assumed by the

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3 Co. 33.

Co. Lit. 89. a note B. 14.

2 Atk. 14 ———

Guardian & Ward –

Cont. – IV. Guardians for Nurture –

There can be no such thing as a Guardian by nurture except where the infant has no other and where he is not heir apparent –

Younger male children therefore are subjects to this kind of Guardianship Co. L. 84, 88, 89 note 13.

This Guardianship belongs to fathers and mothers only; but if they be dead, the Chancellor will appoint one to stand in their stead. When an infant whether male or female reaches the age of 14 this ~~guardian~~ guardianship determines and before that time it extends to the custody of the infant only.

When the Guardianship devolves upon the mother the ward being a male, the Chancellor may appoint another Guardian but not so if the ward be a female without good cause shewn –

V. Testamentary Guardians

The power of appointing testamentary Guardians is derived from ~~the statute~~ two statutes – the 4 & 5 of Wm. & Mary & the 12th Ch. 2, but the law on the subject is chiefly found in the latter –

3 Com. 417.

2 Wil. 129 2 P.W.
101. Co. Lit 88.
1 P.W. 708 ——

2 Com 234.
2 Atk. 14. 3 Com.
417. ——

Co. Lit 89.
ante 16.

Guardian & Ward

These Guardians may be appointed either by deed or by will, if the instrument of appointment be signed by two witnesses, and this may be done tho' the father be a minor

This power of the father extends to all the children, even to a child "in ventre sa mere"; The appointment may be either in possession or remainder and may be to continue to full age, or to marriage, or to any time short of full age.

The Guardian has the custody of the person and estate both real & personal of the ward & by this any other Guardianship is suspended.

But this Guardianship is not assignable it being founded on a present trust or confidence which the father reposed in the Guardian.

These Guardians are liable to the control of Chancery.

VI. Guardians by special Custom

Guardianships of this kind are derived from laws that have a local and limited operation and not from the universal laws of the Realm

3 Com. 418. Co. Lit.
87. & 89. note 16.

Co. Lit 89.
note 16.

Co. Lt. 89.
note 16. —

We shall therefore pass them over as a particular acquaintance with them would be useless.

VII. Guardians by the Election of the Infant.

A Guardian by the election of the infant is only where there is no other, a case in which an infant may elect his own Guardian.

This kind of Guardianship seems to have originated since the restoration.

There has been no particular form ~~settled~~ of appointment settled, tho' an appointment by deed of the infant was holden good in the case of Lord Baltimore. Whether a hand appointment would be good is doubtful.

The age at which an infant might elect ~~an infant~~ his Guardian is doubtful, some say 14 others at or before that period.

VIII. Guardians by the Appointment of the Chancellor

This kind of Guardianship is of a late date and

Co. Lit. 59. note
16. 8 Doe 679.
4 Coke. 176.

3 Atk. 631.
4 Vin. ~~167~~ 176.
3 Com. 418.
Burn 1496.
Co. Lit. 131. b.
132. a.

Cro. J. 641
Co. Lit. 84.
note 16.

2 Vent. 353.
3 Atk. 399.

Guardian & Ward –

can happen only where there is no other –

The right of the Chancellor to appoint devolves on him from the King – who is "parens patriæ" and has the care of all the infants thro' the kingdom –

The time when this Guardianship originated is not certain; but the Chancellor acquired the power, which is now indisputately settled, by gradual encroachments –

Ecclesiastical Courts have also claimed the right of appointing Guardians; and it now seems that they can appoint them "ad litem" only, so may every other court "pro re nata"

IX. Guardians ad Litem –

A Guardian ad litem is one who is appointed to manage a particular cause. – Every Court, even a justice of the peace ~~is~~ has a right to appoint such Guardian; there being no other Guardian to manage the cause of the Infant –

The father or mother when Guardian cannot dispose of the estate of the infant for the purpose of giving him an education, for it is the duty of the

Com. 230.
1 Vent. 255.
2 Do. 353.

1 Vent. 255.
3 Atk. 399.
Co. Lit. 89.
8 Co. - 44.
2 Roe. 687.

Bur. 361.
2 Com. 230.
M. Ro. 159.

Guardian & Ward –

parents to educate their Children & of course to bear the expences of their education –

Yet if a parent in consequence of his childs property should give him an education, which but for that property would be unsuitable to his situation in life, as if a poor man, his son having a large estate, should give him a liberal education Chan. will allow the charges and deduct them from the infants estate –

But a stranger Guardian may dispose of the estate of his ward, for the purpose of educating him.

If a Guardian conduct with care and prudence he is not liable for casualties, as he otherwise would be –

Every act which an infant is not compellable to do in Chan. (as if an infant Mortgagee in recovering the mortgage money recovery) is binding

If the Guardian keeps the ward's money in his hands he is accountable for the interest unless he show, that he could not safely put it out to interest, for as the Guardian is bound to ~~contract with~~ faithful conduct with fidelity it is right that he should account for all which he might have

2 Com. 231.

Chitt. Cos. 156.

2 Com. 230.

2 Com. 234.

1 Ves. 435.

2 Com 231.

1 Ves. 403.

435

2 Ves 629.

Guardian & Ward

made from the estate –

It is the duty of the Guardian to pay the wards debts not out of his own property but out of the wards; & this is for preventing any loss or hazard; otherwise if any loss happen it shall fall on the Guardian.

Guardians may not speculate with the property of their ward, if it be put to any beneficial use the ward shall have the advantage of it –

If the ward holds a mortgage, it is the Guardian's duty to make payment of the debt, out of the rents and profits of the mortgaged premises –

A Guardian has power to vest his wards money in lands; but if he do so the ward when he comes of full age may have his election of the money or the land, but if he choose the money he must recover the land to the Guardian which he purched in his name –

But this right of election is personal therefore on the death of the ward, his representative must take the money and his Guardian the land –

It is the duty of the Guardian in General to account with the ward for the principal and interest of the wards money – But if the wards

2 Com. 231.

Tab - 58.
2 P.W. 111.
562.

2 P.W. 112.
562. 1 Ro.
698.

Guardian & Ward –

money was put into his hands for a particular purpose and he apply it to some other use, as to a lucrative trade the ward when he comes of age may have his election, to take either money & interest or the money and profits accumulated by his Guardian –

Guardians are usually made to account with their wards by preferring a bill in Chancery. There is however no doubt but that an action at Law might be sustained. The remedy by a bill in Chancery is more extensive than by an action at law for in Chancery the guardian may be put on his oath –

In Ch. the guardian may be compelled to account annually or at any period, concerning the ward's estate or he may even be displaced –

But Chan. have a particular jurisdiction over the marriages of infants, entered into without the consent of Guardians as they have power to inflict certain punishments for such marriages –

The Chancellor when he appoints a guardian requires him to enter into an engagement, that he will not marry his ward unpitatably. If a marriage takes place, after being prohibited by Chancery,

2 P. W. 562.

3 Atk. 30.
2 P. W. 112.

Hard. 96

Guardian & Ward.

the Court will punish the offender for contempt - they will punish by imprisonment, as for a misdemeanor & bring them over to answer for an information, to be lodged against them in some Court of criminal jurisdiction or judicature.

Chancery will also punish a Guardian in case he suffer an unequal or disadvantagious match to be entered into by his ward -

And even upon the apprehensions of the ward's intention to enter into a disadvantagious marriage, they will secure his ~~marriage~~ person so that he cannot enter into the marriage, and by a prohibition on the opposite party; if the opposite party be also a ward on his Guardian with a retatte, ~~penalty~~ penalty annexed to the prohibition -

I apprehend that it is customary for Guardians to bind out their wards, ~~to~~ apprentices -

If a Guardian who has care of the real property of the ward commit waste; Chancery will compell him to repaire the damages committed -

Infants have one peculiar privilege which is that if a stranger trespass upon their estates, the trespass may be waived and the trespasser called to account in an action.

1 Ld. Ro. 114.
1 B.
3 Salk. 528.
Ld. Ray. 1475.

3 Salk. 128.
1 Bl. ——

Cowth 43 B.
Ld. Ry. 567.

3 Ld. Ro 355
Ld. Ry. 567.

3 Ld. Ro 355.

Guardian & Ward.

Of the Settlement of Minors.

It is regularly true that the settlement of the Father is the settlement of the Child, and that a change of the Father's settlement, is a change of the Child's settlement.

It is a general rule that the acquirement of a new settlement is the loss of the old settlement.

But this does not hold true where the settlement is by virtue of the freehold, such settlement not being lost by the acquisition of an other; Indeed the ~~case holds~~ only rule holds only in cases of settlements acquired by birth, by residence or by derivation from parents.

If neither father or mother have any settlement the place of the child's birth, is the place of his settlement.

A ~~cap~~ settlement by residence may in some ~~some~~ cases be acquired by an infant. If however the Infant residing abroad be considered one of his father's family, he gains no settlement by such a residence. But if he be severed from his father's family and of course emancipated from paternal authority; he gains a settlement as tho' he was an adult.

Yet after such an emancipation he gains no

Burr. settlemt.
cases 270 - 538.
or 638. ———

Stra. 638. & 31.
3 T. Ro. 114. 356.

L.D. Ry. 1473.
x Burr. set. ca. 49
64 372 ———

Strange. 544.
Burr. se. ca.
162. Salk. 528.

3 Salk. 529.
Carth. 149.

Guardian & Ward—

settlement by derivation of his parents.—

A child may be emancipated by either of the following occurances

I. By attaining full age.—

II. By marriage—

III. By gaining a settlement of his own—

IV. By contracting any relation inconsistent with filial subordination—

1 We have remarked that the settlement of the father is the settlement of the child, But if the father be dead and the mother be living, its settlement is that of the mother—

So also if the father has no settlement and the mother has, here will be the settlement of the children—

A widow, having children, in marriage gains her husband's settlement but her children retain their old settlement, & do not derive one from their father in law; for a husband is not bound to support his wifes children by a former husband.

However if the child of the widow be under 7 at the time of the marriage, he may go with

2 Salk. 528

Burr. Set. Cas.
162. 370.

Bass. Just.
378.

Guardian & Ward.

his mother she being his Guardian by nurture & remain with her until the age of 7, when he may be removed to the parish, where the widow was formerly settled –

As by a marriage a woman regularly gains her husband's settlement, so also she loses her old one; but if her husband at his death have none her old one revives – The following is a case directly in point –

Question –

"A woman having a settlement
Married a man with none
The question was he being dead
If that she had is gone"

Answer –

"Quath sir John Prat her settlement
Suspended did remain
Living the husband, but him dead
It doth revive again!!!!!!"

Comes by the learne judge –

"Living the husband, but him dead
It doth revive again!!!!!!"

And it is now settled that not only on his death

Guardian & Ward –

but also on his having the realm, not remaining with or not supporting her she may be remanded to her for= =mer settlement –

Master & Servant.

A servant is said to be one subject to the authority of another generally by force of contract –

A master is the one who exercises that authority from this definition it would seem that a wife or a child is a servant & they are considered as such at law –

The relation of master and servant is founded in convenience, whereby a man is enabled to call in the assistance of others when his own skill and labour will be insufficient. 1 Bl –

Of the different species of Servants. –

The law of Eng recognizes but four species of servants I. Apprentices II. Menial servants. III. Day laborers and IV. Bailiffs, Factors, Brokers, Agents, & Attorneys, &c.

Among the four mentioned species of servants, is not to be found absolute slavery, which has certainly been legalized in this country. Absolute slavery must either be founded on the laws of nature, the Com. law of Eng. or on our own local laws or usages –

As slavery is not a natural right, nor supported

3 Bl. 546.

L. Ray. 1117

Salk. 68.

4 Co. 94 —

Master & Servant.

by the Com Law of Eng: It must in this country depend on our own local laws, or usages which have been sanctioned by Congress.

There are in all countries what are called public slaves. A public slave is one, who for some offence against the laws of his country is judicially condemned to confinement & labour for a certain term of time or for life.

II. Of Apprentices —

Apprentices derive their name from the ~~word~~ French word apprendre to learn. And as the name imports, they are such persons, as are bound for a term, to their masters generally for the purpose of learning an art or trade.

In order to be apprentices they must be bound and the contract by which the relation of master & apprentice subsists must be by deed —

This seems to be the rule of Com. Law and is the only case where at Com. Law an original contract must be have been in writing 6 Mod. 182.

All other species of master and servant may subsist by force of a parol contract —

The children of poor parents may be bound out

1 Ch.

3 Bac. 547.
1 Com. 94.
5 T. R. 716
Cro. Ch. 170
448

Cro. J. 497.
3 Bac. 467.
Doug. 500.

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in apprenticeship, by their ~~an~~ overseers, with consent of two justices; till the age of 24. to such persons as were thought proper, who are compellable to take them.

There is a difference between the age of males and females, the latter are bound only till they are 21. years old.

Apprentices are entitled to no wages, but all other servants are entitled to their stipulated wages except day labourers whose wages are settled by the justices of the sessions or the sheriff of the county & if any person either gives or receives more than the wages thus settled he incurs a forfeiture —

There is a statute declaring that minors shall be bound by their own deeds of indenture to all intents and purposes — But notwithstanding the strong terms in which the stat. is couched; courts have determined that such deeds are voidable as against the minor & that he is not liable to an action for a breach in the covenants in the deed.

If however he continues with his master, and serves his time out, he becomes free of the trade and acquires a settlement in the parish where he served the last forty days.

8 Mod. 190.
Doug. 500.
518.
1 Atk 518.
1 Bol -

12 Mod 553.
Stra. 1266.
Salk 68. Ld. Ray.
683. Bac. 134

Master & Servant

Where the father joins with his son in such a deed the father is liable to the covenants therein —

No master has a right to misuse his apprentice, and if he does it is good ~~cause~~ for departure for which the master has no action on the covenant of the deed.

According to the Com. Law such as an apprentice must be bound, so also he must be ~~discharged~~ discharged by deed — for at Com. Law a contract dissolving a former one must be of as high a nature as that which is dissolved but this rule does not extend so far as it did in former times.

Apprentices may be discharged by one justice with appeal to the quarter sessions or by the quarter ~~sessions~~ sessions, for any reasonable cause either at their own, or their master's request —

At Com. Law apprentices cannot be assigned the contract being founded on a ~~present trust~~ personal trust. On the same ground at the master's death his executors cannot hold his apprentices & for the additional reason that the executor might be of a different trade or none at all; In either of which cases the consideration of the contract would have failed.

Stra. 1267.

3 Salk. 41. 1 Kel.
76. 1 Salk 66.
Eno. El. 553.
4 Com. 96 —

2 Vern. 460.
2 Dd. 64 —

Salk 67. 490.
11 Mod 110 —

Nash & Grant.

So if a submission is entered into by the parent and master of the apprentice, & an award of assignment of the apprentice is made such an award is not binding unless the minor apprentice assents to it.

Whether an Exr is bound to supply the dispa=
=rate apprentices with necessaries is questionable. Altho' reciprocity which is generally necessary to all contracts is here wanting the apprentice being liable to no duty in return yet the authorities support the principle that the Exr is bound.

But where a premium is given with the apprentice, the Exr ought to refund a part of it proportionable to the time remaining, at the death of the Testator and this Ch. will enforce.

Even where a certain portion is stipulated at the time between the parties, to be refunded if the master died before the expiration of the term of apprenticeship. Chancery added a greater than the stipulated portion to be refunded; the master's death happening almost immediately on the com=
=mencement of the term.

So also when an apprentice is discharged the Justice who discharges him may order a proportion=

1 Atk. 149.
Stra. 592.

2 D. Ry. 683.
1 Wils. 96.

Hob. 134. 3.

Master & Servant.

=able part of the premium refunded. ~~as in case of the master's bankruptcy~~

And altho' the master is not dead, yet if any accident happen, thro' his instrumentality by which the re=lationship is dissolved. Chancery will order a propor=tionable part of the premium refunded, as in case of the master's bankruptcy. But here the apprentice or his father will stand in the place of a creditor for the part refunded and be entitled only to an average thereof.

Altho' there can be no valid assignment of ap=prentices except by the custom of London, yet an attempt to assign will bind the master to the co=venants in the deed of assignment, and if the words of the deed be words of assignment by grant or covenant will be implied & the assignor will be liable to the assignee, but if the apprentice ac=cording to the terms of the assignment serve out the time with the assignee he acquires all the privilages thereby, which he would have ac=quired by serving his time with the assignor.

It is the duty of a master to keep his apprentic=ces under his care & he may not send them abroad

8 Mass 236.
12 Pick. 446—

Co. Lit. 117. note
6 Mass. 69.
12. Pick.

Master & Servant.

without an express stipulation, unless it be necessary from the nature of his business, as where one is bound to a seaman for the purpose of becoming a marino.

Whatever an apprentice earns either in the service of his master, or of any other person is his master's unless he waives his right to it.

Property thus acquired ~~must be~~ may be recovered by an action of assumpsit, or any action proper to try the same.

These rules apply to all other species of servants except Bailiffs & factors; but they apply to acquisitions of the servant ~~only~~ by labour only. And to entitle the master to such property, acquired by the apprentice it is sufficient, it is sufficient if he be an apprentice de facto.

When a minor lives with a man as an apprentice ~~it is sufficient~~ without being bound, by indentures, the apprentice may leave his master, or the master may turn off the apprentice at pleasure. Yet so long as they continue together, all the reciprocal duties of Master & Servant exist between them. And if such apprentice serve out his time, he is entitled all the privileges of any other apprentice.

Co. L. 117. a.
1 Ves 83. or 33.
12. Mod. 415.
Salk 68. Cro. J.
653. 2 Roll.
R. 269

Comb. 56.
1 Wood. 169.

3 Bac 559.

3 Bac. 559. 567.

Master & Servant.

By the statute V of Eliz. a minor may bind himself out an apprentice, where he has no parent guardian &c; and if such apprentice escape he may be retaken but would not be liable to account –

There is a material difference between apprentices and other servants in this respect. If an apprentice acquire property by his labour while in the service of a stranger & with his master's consent the master is entitled to it even tho' the labour be of a different kind ~~to all~~ from that to which the apprentice was bound. But on desertion of labourers the master is not entitled to the property which they acquire by their labour, yet he has his remedy against them for desertion.

If an apprentice or any other servant be enticed from his master, the master may have an action per quod servitium amisit - against the enticer; and so in the case of a journayman, who works by the piece.

If the servant be forcably taken away trespass vi et armis is the proper action, if enticed away case.

So also trespass on the case is the proper action for the master, where he sustains ~~the~~ a loss of ~~service~~

Salk. 330. L.D. 1116 —

Co. Lit. 42.

service by the battery of his servant –

III. Of Menial Servants.

They are called menial servants from their being within the walls or *intra menia* being employed within doors.

The contract between them and their master arises from their hiring. If the hiring be general without any particular time specified the law construes it to be a hiring for a year, upon a principle of natural equity that the servant should serve and the master maintain him throughout all the revolutions of the respective seasons; as well when there is work to be done as when there is none. But the contract may be made for any greater or less time –

If their hiring be for a specific time, yet at the expiration of that time a master cannot send away his servant, or the servant quit the master except by mutual consent or a quarter's warning being given previously: or upon a reasonable cause allowed by a Justice

of the peace; or where a special contract has been made that they shall part at such a time—

III. Of Laborers—

This species of servants tho' they are called day laborers generally, properly include laborers for a week a month a year; there are no general rules exclusively applicable to this class of ~~ser~~ servants.

But there are a number of statute regulations concerning them, directing how long they must keep at work in Summer & winter empowering the Justices of the sessions ~~of~~ or the sheriff of the County to settle their wages, punishing such as leave their employments and ~~inff~~ inflicting penalties upon such as either give or take more wages than are so settled—

IV. Of Agents Factors Baliffs &c.

These are servants of a higher order than any of the former but they are never the less considered as servants so far as their acts affect their employers

1 Wood. 469.

4 Com. 217. 227.
1 Wood 469.

Amb. 254.
3 T. R. 119.

4 Com. 227.
1 Bur. 493.
494 ——

Com. 228.
1 Ves. 410.

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property.

It is very difficult to lay down any rules that are general with regard to the duties arising from this relationship, there being such a diversity of servants, that fall under this species, & their employments being so infinitely various –

It is however a rule, that every agent he is bound strictly to pursue his commission –

So also, – that a factor may retain his employer's or principal's goods to satisfy any demands which he may have against ~~him~~ his principal –

And this rule also applys to attorneys but extends no farther; yet if the factor once gives up his principal's goods ~~to satisfy any demands which he may have~~ he has no specific lien upon them, but stands upon the same footing as other creditors –

If a factor either buys more or gives more, than his commission warrants him, his principal may disclaim the purchase –

So if he takes less for the principal's goods, he is liable to the principal –

If a loss happen to the goods while in possession whether in

1 Wood. 469
4 Com. 627.

1 T. R. 604. & Dr.
119. 1 Bur. 493. 4.
Amb. 254.
Bl. R. 1154.

5 T. R. 119.

4 Burr. 109.

Master & Servant.

of his factor he is not liable if he has conformed to his commission and conducted with fidelity & prudence, but otherwise he is liable.

The factor has no right to pawn the goods of the principal, for his own debts and no pawnee acquires a lien upon the goods so pawned, not even the lien that the pawnor had upon them, for it is a maxim that a personal trust cannot be assigned transferred; but the principal must satisfy the pawnor for his lien upon the goods before he can have his action against the pawnee for them —

The possession of the goods must be actual not constructive only - to entitle the factor to a lien upon them —

Where the master is liable for the acts of his servants, or may take advantage of them, and also of the servants liability —

— Many acts of the servant are considered as acts of the Master, but for those acts only that are performed by the servant, in the business of the master, is he liable —

It is laid down that the master's liability

2 T. R. 71. 5 Do.
175. Doug. 22.
1 Ves. 360.

3 Bac. 559.

1 Mod 98. Cro. J.
223

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arises from a command either express or implied. this doubtless is in many cases the ground of his liability, but the principle clearly is not broad enough to support all the cases thus if a servant accidentally do a wrong while in his master's business without doubt his master is liable. But can his liability arise from his having commanded the servant to do the act? —

The case supposed is one where it is impossible there should be a command, the act not being premeditated but involuntary & accidental —

In this case & in many others the liability is founded upon the maxim; that where one of two innocent persons must suffer, that one of the two, that intrusted or enables a third person to do the injury shall sustain the loss.

Any contract made by the servant, the servant having authority to enter into it, is considered as if it were made directly by the master and as such may be declared on, as the act of the master without naming the servant —

If a servant be cheated of his masters property the master may sustain an action therefor.

1 Bl.

1 Com. R 10.
or 216. 1 Roll. R.
8 Co. 32. Dyer
260 ——

Cro. J. 469.
3 Mod. 349.
1 Do. 209.
269 —

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The master is liable, not only where he commands but where he permits his servant to do an act injurious to an other —

If an innkeeper's servant robs his guest the innkeeper is liable because it is ~~to~~ said Qui non prohibet cum prohibere potest jubet: but the presumption that the innkeeper commanded because he did not prohibit the robbery is illiberal, it is making a person who we know to be innocent guilty of felony. Indeed the innkeeper can be considered liable only on the ground of the maxim mentioned above —

The authorities are very contradictory on the question whether the master is liable civiliter for the fraud of the ~~person~~ servant committed in the ordinary course of his business. 1 Roll Ab. 95 p. 143.

Were there no authorities we should not hesitate, for surely it is reasonable that ~~one~~ those who employs a knave should suffer by him rather than an innocent stranger —

If a servant sell bad wine whereby the health of the guest is injured, the innkeeper is liable & here not having prohibited the sale of that

1 Roll. 95.

1 Roll. ab. 95.
1 Bl.
Bac.

4 Mod. 303.
12 Do. 54.
3 Do. 289.
Salk. 613.

wine he may fairly be presumed to have commanded it.

So also an innkeeper is liable, if his servant provide bad food, for food is of so changable a nature, that what yesterday was good & wholesome, to morrow may be in a putrid state —

It is said that ~~a~~ the servant is not liable for any damages that arise from the sale of such impure wine or food — because he acted in conformity to a command. But commands do not authorize a tort, for it is a general rule, that where a principal is not empowered to do an act no one is justifiable in doing it by his command. Then if I command my servant to sell wine & provisions which are poisoned, is he justifiable in doing it, because he acted in pursuance of my command?

If a servant be robbed of his master's goods, either the servant or master may have an action for the redress of the civil injury. But robbery is a felony ~~so that the~~ ~~is~~ therefore the civil injury is merged in the public crime, so that neither can have redress for the private injury or wrong, unless it be against the herinred where the

1 Wil. 328.
1 Bl. ———.

3 Mac. 559.

robbery was committed on failure to convict the robber

But if the master has recovered, the servant has no right of action and e converso. So to, if it is said if one of the two have commenced an action the other is barred.

It is laid down in various authorities that both master and servant are liable for torts committed by by the servant Esp. 580–6.

If money be illegally gotten from a servant the master may recover it by an action of Deb. Assumps. even tho' the servant was participes criminis with him who detained the money. But had the master been equally guilty with him who detained the money he could not support ~~the action~~ such an action – for it is requisit thereto that the Pltff. should be void of offence.

Where money is taken wrongfully from the servant – he being a partaker of the guilt the maxim that quod facit per alium facit per se does not deprive the master of his remedy.

But if the servant has foolishly squandered away his ~~money~~ master's money, the master can have no remedy of those who obtained it legally

2 Roll. 5. 693.
1 Com. 168.
Salk. 2 89. 382.
4 T. R. 117.
Stra. 633 –

Master & Servant.

thro' the folly of the servant –

In some cases the master is liable for the acts of the servant, not done by his command either express or implied.

If a servant do an injury while in pursuance of the business of the master; either wilfully thro' negligence or thro' want of skill the master is liable thus for example, if the servant of a black smith while shoeing a horse drives a nail designed by thro' the quick of the foot or hoof and injure the horse both master and servant are liable. If he had so driven the nail thro' carelessness the master only would be liable and so if thro' want of skill

For in each of these cases if the master had done the act himself, he would be liable and ought therefore ~~thus~~ be liable when done by his servant –

The black smith is here liable on the ground of an implied ~~consent~~ contract, which he and all other mecanics are under, to perform the business of their trades in a workman like manner.

A rule anciently laid down by the Court of Kings Branch is that if a master directed his

1 Roll. 90.
Bac.
Pops. 143 ——

Salk. 441.

Salk 282.
Shin. 229.

Stra. 1033.
1 Bl.

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servant to sell a worthless horse for a good one at a fair he was not liable unless he pointed out the person, to whom the servant should sell the horse, and the servant actually sold the horse to the person pointed out.

The rule was rediculous and is exploded Eng. J. 468.

If one employ another to drive a team to a certain place, and the driver thro' carelessness injure another the employer is liable, having injured another by ~~having in~~ employing the driver.

If a servant injure another not while he was in the direct employment of his master's business the master is not liable unless it was done by his com= =mand express or implied.

There is a distinction between the acts of a ser= =vant wilfully committed and thro' negligence.

If the servent directly engaged in the business of the Master do an injury thro' carelessness the mas= =ter is always liable.

The servant however is not liable where the transaction in which he was engaged, was founded on a contract between the master and party injured

Cow. 406.
1 Wil. 431.
Esp. 603.
596.
or
586.
1 ~~Term~~. Div
190. 223.
J. Bay. 220.
Cartt. 58.

Stra. 1083. 69. K.
411. 1 Wils. 423.

Stra. 223.
Cro. Eliz. 175.
Cow. 406.

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as in the case where he lamed the horse in showing him but to this rule there is one exception founded on its own peculiar circumstances, this is where the master of a ship who is servant to the owners, injures the freight, thro' his carelessness or negligence in which case the master is liable to the owners of the freight, for they are hardly ever known to each other; the one may be at Bengal and the other at Hartford, and the master acts more independently of the owners than other servants of their masters, indeed it is necessary for the convenience of trade that the master of a ship should be liable to the owners.

But where the contract is not founded on a contract between the master and party injured; as in the case of the servant who carelessly drove the team to the injury of an other the servant is liable.

But on the other hand where a servant wilfully commits an injury he is in every case liable, tho it be done while in the performance of a transaction founded on contract, between the master and the party injured, as in the case where the servant wilfully lamed the horse in showing him.

If a servant desert from a master, and down

Salk. 441.

Stra. 228. 562.
563. 3 T. R. 762.
6 T. R. 125 —

3 Bac. 564.
1 Roll. 105.
2 Moor. 248.
Cro. J. 265
1 Sid. 298.

Stra. 1088.
10 Mod. 109.

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injury the servant only is liable, as if one go employed to drive a team go to a distant place and beat another.

It is laid down that a master is ~~no~~ in no case liable for the wilfull acts of an other who is his servant. But this is merely a dictum of the reporter and is not true –

The master is always liable for the wilfull acts of his servant, where done in the immediate employment of his business, but where the servant quits the business of the master either voluntarily or thro' neglect the master is not liable.

Of the servants liability to his master –

In certain cases the servant is liable to his master for acts by him committed – And it is a general rule that for all those acts, whether voluntary or negligent by which the master is injured he is liable – but where an injury arises for want of skill or strength the servant is not liable, for he is bound only to be diligent and faithful.

The servant is liable also to his master, to the damages to which the master has been subjected

1 Mk. 430.

3 Prae 563.

1 Mod 209.

1 T. Ro. 51.

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in consequence of an injury to a third person, by an act of the servant whether voluntary or negligent.

And here we will remark once for all that not only those we usually call servants, but also a wife a son a friend is proved to be a servant that is while acting under authority and are subject to all the rules of master and servant, except in=
=deed that a wife cannot be liable to her hus=
=band in damages —

Where a servant is obedient to his master's commands, ignorantly commits a wrong, in the abstract which considered in the abstract is no wrong, he is not liable to his master: But if the act absolutely considered is a tortious act he would be liable —

It has been laid down that if an attor=
=ney witness a release or discharge of a debt and afterwards prosecute and recover on the debt he is not liable but this rule probably originated in the brain of an Attorney —

And it has been determined, that an attorney knowing of a non suit, is liable if he prosecute

Dut. 136. Eq. 618.

1 Ld.
1 Show. 95.
4 Mod. 398.
2 Vern. 543.

3 Salk. 234.
10 Mod 109.

1 T. R. 172.
674 ———

9 Mod. 398.
Ld. Ry. 224.

Brown. 642.
Com. 450.
3 Keb. 635.
3 Salk. 234.

3 Salk. 234.
Ld. Ry. 224.

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Of the master's liability on the contracts of the Servant

The master is bound by those contracts made by the servant, acting within the scope of a general or special authority, either express or implied.

An express authority needs no discription. By an implied general authority is one, by which a servant acts, who is usually employed in contract=ing for his master Com. 450. 2 Vern. 643. Ld. Ry. 224.

A public agent or servant contracting for the public is not liable on those contracts tho he may make himself personally liable.

So an implied special authority, is one by which a servant acts, in a special case, where he contracts in the name and presence of the master who is ab=sent 10 Mod. 109. 1 Vern. 243. or 843. 1 Raw. 95.

If a servant without authority buy goods which his master applies to his use, he is liable on the ground of a subsequent implied assent.

It is laid down that if a servant never having had authority to contract, have money put into his hands, by the master, for the purpose

* the court were divided in Ld. Raymond.

X An agent cannot bind his principal by deed without an authority for that purpose by deed. parol author=ity is not sufficient. 2 Roll R. 4 T.R. 3 B. 7 Dr. 207, 209. 3 Bac. 408. 4 Com. 49.

Show 95.
1 Bl.
3 Salk. 234.

1 T.R. 760.
10 Mod. 109.
Brow. Ch. 64.
cases in law & equity 110.

~~Stra~~. 653. 504.
4 T.R. 177.
2 Dr. 75 b.
10 Mod. 109.
Salk. 289.
Esp. 630 —

3 T.R. 760.
761 ——

of buying goods, which goods he buys upon trust converting the money to his own use, and the mas=ter converts the goods so bought to his use he is liable -

A master giving his servant a general au=thority to business in one way, is not bound if he do it in an other, for by the supposition he acts without the general authority -

Altho' the master is generally bound by the acts of the servant within the scope of a general=authority implied. Yet he may put an end to that authority, for by giving public information that it has ended but after the relationship had ended or dissolved, the master will be bound till the dissolution be sufficiently known either by lapse of time or by advertisement -

X If a servant having authority to sell his master's property, make a warranty thereof, the master is bound by that warranty; unless he ex=pressly prohibit his servant to warrant -

But where the scope of his authority or ra=ther where the servant acts within the scope of his authority, the master is bound by his war=

Cro. J. 469.
pop. 14 B. 2 Roll.
267. 3 Bac 560.

=ventry, tho' expressly prohibited unless the prohibition be made notorious —

A case generally cited when the master's liability is called in question is the ~~following~~ following A having a quantity of counterfeit jewels; directs B. his servant to go to Barbary and sell them to the King or some other person without letting him to conceal ~~to~~ or make private the defects B. arrives in Barbary and employs C. to sell them to the King of Morocco to whom he pretends that they are real jewels C. accordingly sells them as such to the King B. takes the avails of the sale and returns to England. The King discovers the Jewels to be counterfeit and imprisons C. for the imposition C. on being liberated returns to Eng. and commences a suit against A. for the imprisonation of his servant, but the Court held that an action would not lie because in the first place A did not direct B. to impose on any particular person. A truly mischievous reason. as if to discharge a musket in a crowd and kill a person were less criminal than to discharge it at a particular person and kill ~~him~~ him.

quem 4 T. R.
177.

2 Roll. A. 67.
Esp. 62 g. 652,

6 T. R. 411.

Lord. 646.

and in the second place the master did not tell him (his servant) to impose on anyone, that he did not make known the defects in the Jewels is suffi=cient is sufficient, for suppressio veri is as illegal as suggestio falsi.

It is a settled rule of law that the concealment of defects amounts to a warranty and according to some authorities an express ~~authority~~ warranty.

On principle it is clear that the master is liable for the fraud of his servant committed in the transaction of his masters business. But this subject we have already noted.

If a servant employed in his masters business ~~and~~ employ a third person, who either voluntarily ~~thro'~~ negligence or as the case may be thro' want of skill does an injury, such intermediate person who hires the second servant is not liable, for if he be liable, he must be liable either as master or servant. But he is not master and cannot be liable as servant for he did not perform the injurious act.

To the general rule that masters are liable

Carth. 487.
Salk. 18.
Com. 100.
Cow. 754.
~~764.~~ 764.
Esp. 624.

3 Wil. 448.
Cow. 764.
Esp. 628.
Salk. 18.
Cro. El. 145.
Cow. 406.
Esp. 603.
1 Vin 233.
Doug. 42.
2 B.R. 154.
Salch. 157.

1 Roll. 95.
3 Bac. 563.

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for defaults of their servants there is an exception in the case of postmasters who are not liable for the defaults of their subordinate officers. This exception is taken on the ground of policy, for if post masters are made liable, the burthen of responsibility would be so great that no one would accept the office of post master, Besides they must be liable if at all as common carriers whom they resemble in no material point as they are public ~~carriers~~ persons, and have no hire from others who intrust their property in the mail.

A post master however is liable for his own defaults, ~~an~~ on the same ground that masters are liable for the default of their servants. Sheriffs are liable civiliter, for both the non feasance and the misfeasance of their subordinate officers. As deputy sheriff goes de At Com. Law under sheriffs are liable not for mere negligence or omission but for wilful acts only.

A servant acting for his master may if he pleases make such a contract as will bind

1 Bl. 1 Hale 506.
1 Haw. 136.
Pop. 94. Moor.
246 ———

1 Hale 504. 666.
1 Haw. 136.
Pop. 84. Moor.
246. 3 Bac 564.

3 Bac. 565.
1 Haw. 138.
1 Hale. 568
666. 667.
4 Bl. ———

himself only.

When the Servant is guilty of Larceny by ~~by~~ Embezzling his master Goods —

At Com. Law a servant having the oversight of his master's goods or the charge or care of them but not being in actual possession of them was guilty of larceny by taking them animo furandi.

But by the Com. Law if the goods had been delivered to one to carry the carrier would not have been guilty of larceny, tho' he took them animo furandi unless the fraudulent or felonious intent were precedent to the delivery. If he procured the bailment of the articles with an intent to steal them, this intent rendered the contract fraudulent from the begining, so that if he takes them he is guilty as tho' they had never been bailed.

And by stat. 21. H. 8 if any servant embezzles the master's goods, to the value of forty shillings it is made felony. except in appren-

Dyer 5. 1 H. 139.
3 Bac. 566.

1 Haw. 138.
3 Bac. ~~565.~~
~~566.~~ 565.

1 Hawk. 139.
Dyer. 5.
Haw. 139.

3 Bac. 565

3 Bac. 566.

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tices and servants under the age of 18. years.

By this statute no waste of the master's goods however ~~unwillingly~~ wilfully committed amounts to larceny nor can Larceny be committed of a chose in action –

Such persons only are included in the regulations of this statute, as were servants at the time both of the taking and delivering of the goods –

So the stat. is confined to goods delivered to be kept and such as the master can identify –

A servant receiving the goods of an other servant comes within the stat. By a subsequent statute of Hen. 8. benefit of Clergy is taken away is taken away for this crime –

Of the Master's right of correction –

A master's right of correction is the same as that of a parent –

The species of servants called agents factors &c are excluded from the following rules, such servants not being liable to correction and in this country day labourers are also exempted –

Hub. 628.
1 Haw. 130.
Cro. Ch. 179.
2 Show. 289.

* The legal signification of the word wound is not defined or properly defined in the books —

1 Siv 175. 177.
3 Bac. 566.

2 Mod. 167.
8 Dr. 120.
3 Bac. 566.

1 Siv 177.
2 Mod. 167.
3 Dr. 120. 218.
330. 3 Bac.
566. 567 —

3 Bac. 566.

9 Co. 75.
3 Bac. 569.

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Apprentices of any age and it is said menials and labourers may be corrected. But this is understood of those only who are under the age of 18 years 1 Vent. 70. 1 Sid 176.

The master may correct his servant for abusive language for he is entitled to respect –

*But if he should correct him unreasonably or immoderately or wound him the master is liable.

In an action of this kind brought by the servant the master must plead not guilty – and from the facts given in evidence the jury must determine whether the master has been unreasonable immoderate or wounded the servant in chastising him –

The master must show the Pltff. to be his servant, to what class of servants he belongs and in what manner he is his servant –

Where it is the masters duty only to correct he cannot deligate the power to another to correct the servant for him –

Miscellaneous Rules.

1 Bl. & Roll.
546. Salk. 407.
4 Coke. 112.
Ld. Ray. 62.
Stra. 955.

Latch. 141.
Dutton. 2. 42.

1 Wms. 111. 1 Vern.
454. 473. 474.
Rub. 63. 64.
3 Bac. 567.
5 Mod. 287.
Foster 262.

1 Vern 484.
3 Bac. 568.

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It is admitted that a servant may justify an assault in ~~favour~~ defence of his master. But whether a master may justify an assault in defence of his servant seems unsettled the weight of authorities however inclines to the negative, still it is believed that a contrary opinion is the true one; for may not any person justify an ~~assale~~ assault in defence of an other —

A servant may not it is said justify an assault in defence of his master's goods or child; but this is thought to be a questionable rule 3 Bac 568.

Where a master correcting a child apparently with moderation unfortunately kill him he is guilty of homicide ~~only~~ by misadventure only. But if the correction were obviously unreasonable either in the manner or the quantity, the master would be guilty of manslaughter at least & as the case might be murder —

If the Servant in defence of his master or master in defence of the servant kill an other the nature of the ~~defence~~ offence will ~~depend~~ depend on the nature of the case and its attendant

circumstances, but the offence will be of the same magnitude whether the master or the servant be the Homicide.

It is laid down that a servant cannot avoid a deed obtained from him by his master; tho' by dures by which is meant that a servant cannot avoid a deed obtained by his master menaby because he is his servant tho' he may respect and fear him. 1 Roll. 687. 3 Bac. 5 68. 3 Brow. 2. 276.

A full recovery against a servant who has been enticed away - for loss of service is a bar to an action against the enticer 1 Bl. R. 347. Salk 380. Burr. 1345. W. Bl. R. 387

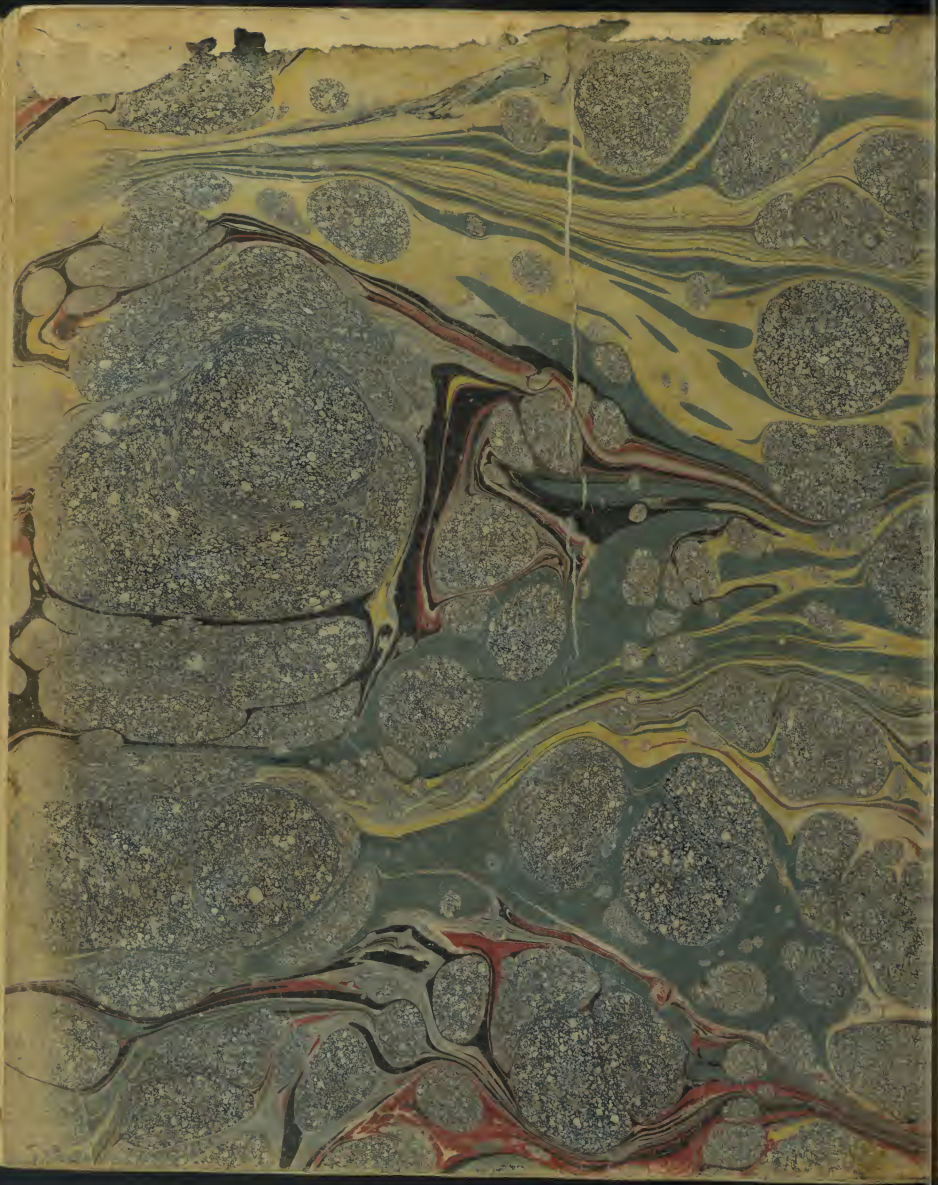
But whether judgment without satisfaction would bar, is a question - This question however seems decided by the rule that a judgment against two or more tortious persons is a bar to an action against the others - Burr. 1353. 1354. —

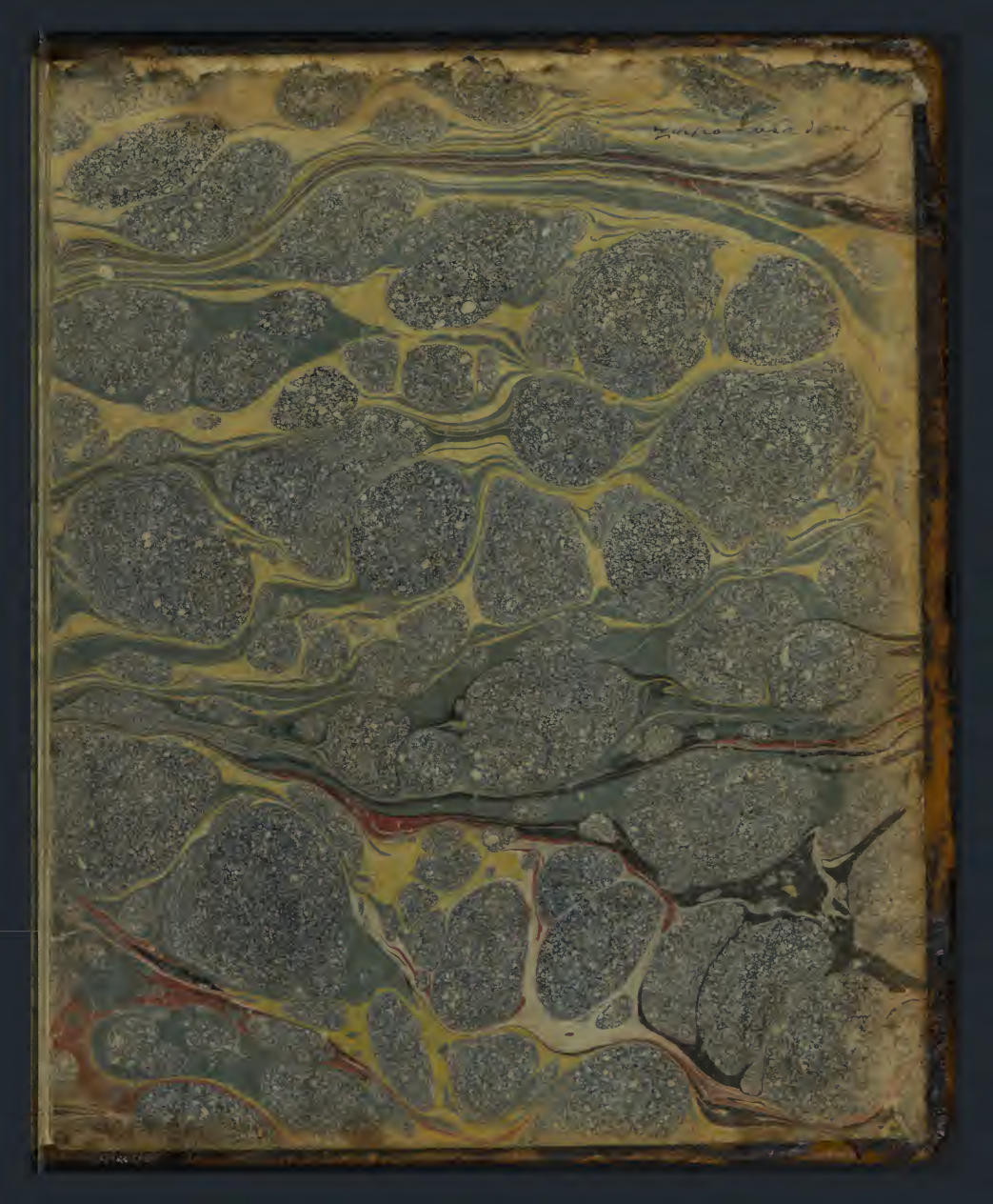
With regard to settlements which servants gain by residence it may be observed that apprentices gain a settlement in the place where they served the last forty days and other servants ~~for~~ by being hired for a year when unmarried and childless & serving a year in the same service — 1 Bl.

List of subscriptions papers

5 sent to William Smith 5
6 sent to Thomas Day 6
7 given to ~~Mr~~ Jackson for a church am to be paid to Dunmock
to his father 7
1 to Jabez Huntington 1
4 delivered to Huggins for Walters 4
4 delivered to Moore 4
11 delivered to Moore to distribute 11
4 ~~delivered~~ sent to Joseph Woodbridge 4
sent to Chapman 4
6 sent to George Griffin 6
4 sent to Phelps Huggins 4
4 sent to Joseph Dwight 12
12 sent Elnazer Bald in ~~to~~

Æt. 16 – wf.
Discharged on 6. Bail





REEVE'S
LECTURES

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